Supreme Court, U.S.
FILED

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No. 001740 MAY 21 2001

In the

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Supreme Court of the United States

LLOYD BROWN,

Petitioner,

-versus-

KINNEY SHOE CORP., doing business as Foot Locker, doing business as ASF/Foot Locker, doing business as Champs Sports, doing business as Lady Foot Locker, doing business as Susie's, doing business as Athletic X-Press,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

DAVID BRENNER
Counsel of Record
KRISTIN L. LEMKE
BURNS ANDERSON JURY & BRENNER, L.L.P.
4807 Spicewood Springs Road,
Bldg. 4, Floor 2
Austin, Texas 78759
(512) 338-5322
Attorneys for Petitioner

Curry & Taylor 202-393-4141/Washington D.C. 20005

98 pp

QUESTIONS PRESENTED

I. Can an appellate court reverse a district court's failure to grant a post-verdict Rule 50 motion for judgment on a question of fact not submitted to, considered by nor found by the jury in its verdict?

II. Can an appellate court substitute its judgment for that of the jury, ignoring the standard this Court has set for reviewing a motion for judgment?

III. Is it proper to reverse and remand an entire damage award where only one element of damages is in dispute?

IV. Is a district court required to ask the jury separate questions under 42 U.S.C. Section 1981 and Title VII where the elements and evidence to prove both theories of liability are the same?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in *Brown v. Kinney Shoe Corp.*, 237 F.3d 556 (5th Cir. 2001), is set forth in the Appendix hereto (App. 1a-20a). The Order of the District Court for the Western District of Texas in *Brown v. Kinney Shoe Corp.* is unreported and set forth in the Appendix hereto (App. 21a-52a).

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Fifth Circuit affirming in part, reversing in part and remanding in part the decision of the District Court of the Western District of Texas was filed on January 15, 2001. The last order on a timely filed petition for rehearing was filed on February 21, 2001. This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Equal rights under the law—42 U.S.C. Section 1981

> (a) Statement of equal rights
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment
> The rights protected by this section are

protected against impairment by nongovernmental discrimination and impairment under color of State law.

Title VII—42 U.S.C. Section 2000e-2

(a) Employer practices.It shall be an unlawful employment practice for an employer--
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Discrimination by Employer—Texas Labor Code Section 21.051

An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer:
(1) fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment; or
(2) limits, segregates, or classifies an employee or applicant for employment in a

manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee.

Federal Rule of Civil Procedure 51

No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

Federal Rule of Procedure 50 (a) & (b)

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment-- and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

STATEMENT OF THE CASE.

Lloyd Brown sued Foot Locker because he was the victim of intentional discrimination based on a company practice of assigning African-American managers only to ethnically classified stores. He brought his claims pursuant to 42 U.S.C. Section 1981, Title VII (42 U.S.C. Section 2000(e)) and the Texas Labor Code. After trial, the jury returned a unanimous verdict for Mr. Brown, finding intentional race discrimination and assessing the following damages: $69,493.00 in past and future lost wages; $21,500.00 in mental anguish damages; and $250,000.00 in punitive damages. (App. at 72a-74a). The court entered a judgment in favor of Mr. Brown. (App. at 56a-57a). Foot Locker filed a Motion for Judgment following the verdict, arguing, among other things, that there was no evidence to support a finding of constructive discharge, despite the fact that no finding of constructive discharge existed. Foot Locker argued that since there was no evidence of constructive discharge, the court must disregard the jury's damage finding in response to Question 2(b), awarding damages for loss of value of earning capacity.

On appeal, Foot Locker complained that the trial court committed reversible error by failing to grant an instructed verdict on Brown's claim of constructive discharge. The court of appeals found that there was insufficient evidence as a matter of law to support a constructive discharge finding and reversed and remanded the case for a trial of the entire damage award. (App. at 1a-20a.)

REASONS FOR GRANTING THE WRIT.

I. THE APPELLATE COURT ERRED IN REVERSING THE DISTRICT COURT'S FAILURE TO GRANT A POST VERDICT RULE 50 MOTION FOR JUDGMENT ON A QUESTION OF FACT NOT SUBMITTED TO, CONSIDERED BY NOR FOUND BY THE JURY IN ITS VERDICT.

The verdict form in this case consisted of three questions. (App. at 72a-74a.) The jury instructions for the questions, a separate document, were thirteen pages long and included separate instructions for each question. (App. at 58a-71a.) The first question asked was, "Do you find from a preponderance of the evidence that Defendant Foot Locker discriminated against Mr. Brown based on his race? Answer 'yes' or 'no'." The jury was instructed that in order to answer "yes" to Question One, it must find that an adverse employment decision was made by Foot Locker because of Brown's race. The jury answered "yes" to Question One and was directed by the charge to proceed to the instructions for Question Two which asked, "What sum of money, if now paid in cash, would fairly and reasonably compensate Mr. Brown for the damages he has sustained as a result of Foot Locker's discrimination against him based on his race?" The instructions to Question Two were over four pages long and explained each type of damage requested: lost wages, loss of wage-earning capacity and damages for past emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment of life. The jury awarded damages for each of these specified damages and then proceeded to Question Three and awarded punitive damages to Brown.

The district court did not charge the jury on Brown's claim of constructive discharge, and the jury did not return a verdict finding constructive discharge. The jury was

instructed that Brown should prevail if he proved that his race was a motivating factor in any of Foot Locker's adverse employment decisions. (App. at 62a.) The jury unanimously concluded that Foot Locker did discriminate against Brown based on his race, and this finding was affirmed by the court of appeals. (App. at 17a.)

Despite the fact that the district court did not question the jury regarding constructive discharge and constructive discharge was never found by the jury, the court of appeals reversed the district court's denial of Foot Locker's motion for judgment on the issue of constructive discharge and the court's damage award in its entirety. The court of appeals assumed that the compensatory damages awarded in response to both Questions 2(a) and 2(b) "obviously included damages relating to both the constructive discharge claim and failure to promote claim." (App. at 17a.) Presumably, the court of appeals arrived at its conclusion based on a portion of the instruction for Question 2 that referenced constructive discharge:

> In this case, the plaintiff alleges that he was "constructively discharged." To find that Mr. Brown was constructively discharged, you must find that Foot Locker made Mr. Brown's working conditions so intolerable that a reasonable employee would feel compelled not to continue working for Foot Locker. If you find from a preponderance of the evidence that Mr. Brown was constructively discharged as a result of discrimination by Foot Locker, you must award him compensation for the lost wages, if any proved by a preponderance of the evidence he has suffered in the past (in subpart "a") and the loss in wage-earning capacity, if any, that the plaintiff is likely to suffer in the future due

> to the discriminatory conduct of Foot Locker (in subpart "b").

(App. at 65a-66a.)

However, *Foot Locker never objected to the instructions for Question 2.* Therefore, Foot Locker was precluded from asserting that the portion of the instruction relating to constructive discharge was reversible error. *Little v. Green*, 428 F.2d 1061, 1070 (5th Cir. 1970). Federal Rule of Civil Procedure 51 states in part, "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." The purpose of the rule is to enable the trial judge to avoid error by giving him an opportunity to correct statements in his charge before the case is decided by the jury. *Investment Serv. Co. v. Allied Equities Corp.*, 519 F.2d 508, 510 (9th Cir. 1975), *citing Swiderski v. Moodenbaugh*, 143 F.2d 212 (9th Cir. 1944); *Sears v. Southern Pac. Co.*, 313 F.2d 498, 505 (9th Cir. 1963). Accordingly, the delay and expense of a retrial are avoided when "'by design or through sheer neglect, the losing party fails to make objection at the proper time.'" *Hobson v. Wilson*, 737 F.2d 1, 31 (D.C. Cir. 1984), *citing* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2551, at 623 (1971). Where a party does not object to instructions before the jury retires, it cannot claim on appeal that the instructions were erroneous. *Id.*

In addressing untimely objections, some courts of appeals have applied the "plain error" rule, an exception to Rule 51 "suited to correcting obvious instances of injustice or misapplied law." *City of Newport v. Fact Concerts, Inc.*, 453. U.S. 247, 256 (1981). Other courts of appeals have refused to allow jury instructions in civil litigation to be considered plain error. *See Hebron v. Touhy*, 18 F.3d 421,

424 (7th Cir. 1994) (finding that although the jury was not instructed to apply the correct body of substantive law, "a court of appeals may not treat jury instructions in civil litigation as plain error."); *Bock v. United States*, 375 F.2d 479, 480 (9th Cir. 1967) (stating, "it is firmly established in this circuit that 'the 'plain error' rule may not be utilized in civil appeals to obtain review of instructions given or refused'." [Citation omitted]). In *Fact Concerts*, this Court did not apply the plain error rule due to the novel issue presented in that case, stating that restricting review to the plain error standard would not promote the interests of justice or advance efficient judicial administration in that particular case. *Fact Concerts*, 423 U.S. at 257. The Court stated, however, that while concluding that the interest of justice warranted plenary consideration in that "unusual case," the Court expressed no view regarding the application of plain-error doctrine by the courts of appeals. *Id.*

Regardless of the differing standards of review in the courts of appeals, plain-error has not been asserted in the present case and does not exist. Furthermore, the alleged error in the charge in this case neither presents a novel nor unusual issue, and there has been no miscarriage of justice warranting an exception to the clear language of Rule 51. Accordingly, Foot Locker has waived any objection to the jury charge.

Even assuming that Foot Locker had made a timely objection to the reference in the charge regarding constructive discharge, any error was harmless. A jury charge should not be read in fragments, and review of a district court's instructions must be "orbitary and universal, not narrow and monocular." *McDaniel v. Slade*, 404 F.2d 607, 609 (5th Cir. 1968). If a charge fairly presents the law when viewed in its full context, it is not rightfully subject to impugnment. *Id.* Even where an objection to a jury instruction is properly preserved, the hurdle on appeal is a

high one. *Lawson v. Trowbridge*, 153 F.3d 368, 373 (7th Cir. 1998). Jury verdicts are not set aside because one instruction that correctly states the law should not have been given. *Id.* at 374. The court of appeals in *Lawson* stated that "'[w]hen an instruction is given to which no evidence corresponds, the likely consequence is that the jury ignored it. The error in giving it is therefore presumed to have been harmless.'" *Id.*, *citing S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 50 F.3d 476, 481 (7th Cir. 1995) (*citing Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1225-26 (7th Cir. 1995) and *United States v. Cartwright*, 6 F.3d 294, 301 (5th Cir. 1993)). In considering an instruction that should not have been given, the Seventh Circuit held that a party's substantial rights were not affected by the erroneous instruction, observing that "[j]urors consider the evidence and trial as a whole; appellate judges must guard against the error of assuming that jurors dissect instructions as if the sentences were frogs." *Pressley v. Haeger*, 977 F.2d 295, 298 (7th Cir. 1992), *citing Needham v. White Lab., Inc.*, 847 F.2d 355, 358-60 (7th Cir. 1988).

The error, if any, in the charge's inclusion of a paragraph regarding constructive discharge was harmless. The statement was not and has not been alleged to be an incorrect statement of the law. The reference to constructive discharge is in one paragraph of four pages of instructions describing how damages should be assessed only after a jury has already addressed liability. With respect to the jury's finding of discrimination, the charge clearly instructs and questions the jury regarding Foot Locker's intentional discrimination against Mr. Brown based on its failure to promote Mr. Brown because of his race. It is on this basis that the jury answered "yes" to question one and awarded damages in questions two and three. Because the court of appeals found that there was no evidence as a matter of law on which to find constructive discharge, it should be

presumed that the jury ignored this instruction and that the alleged error was harmless.

Furthermore, in evaluating the jury's response to Question 2, the court of appeals should have assumed that the jury's award was appropriate compensation for Foot Locker's intentional discrimination. This is so because the court of appeals was constitutionally required, under the Seventh Amendment, to adopt a view of the case that makes the jury's answers consistent with their finding of discrimination in Question 1. *Hiltgen v. Sumrall*, 47 F.3d 695, 701 (5th Cir. 1995). Even if the court felt the instruction referenced above was erroneous, it should not have reversed the judgment unless the charge as a whole leaves substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations. *Hall v. State Farm Fire & Cas. Co.*, 937 F.2d 210, 214 (5th Cir. 1991). Here, despite the fact that the court of appeals concluded that there was no evidence as a matter of law from which the jury could have concluded that Brown was constructively discharged, it concludes that the jury obviously found he was. Because there was no jury finding of constructive discharge and Foot Locker failed to properly assert error either at trial or on appeal, it was error for the court of appeals to reverse the jury verdict on damages based on a nonexistent finding.

II. IN CONSIDERING THE CONSTRUCTIVE DISCHARGE CLAIMS, THE PANEL IGNORED THE EVIDENCE OF CONSTRUCTIVE DISCHARGE AND MISAPPLIED THE STANDARD OF REVIEW SET FORTH BY THE SUPREME COURT IN *REEVES V. SANDERSON* AND IMPERMISSIBLY SUBSTITUTED ITS JUDGMENT FOR THE JUDGMENT OF THE JURY.

Brown believes it was inappropriate for the court of appeals to evaluate whether Foot Locker's conduct amounted to constructive discharge. However, if the court determined that the jury found constructive discharge by implication, and the post-verdict motion for judgment required it to determine whether there was legally sufficient evidence to support the implied finding, then the court of appeals failed to apply the standard of review mandated by this Court in *Reeves v. Sanderson*, 530 U.S. 133 (2000). In *Reeves*, this Court held that when considering a motion for judgment, the court should review all the evidence and draw all reasonable inferences in favor of the nonmoving party. *Id.* at 150. The reviewing court may not evaluate credibility of witnesses, weigh the evidence, or draw inferences because all of those functions are for the jury. *Id.* Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party. *Id.* at 151. A review of the court of appeals' opinion can only lead to the conclusion that the court applied a standard opposite to that required by this Court.

Assuming that the jury found constructive discharge, in the absence of a jury question, such a finding is supported by the evidence. The court of appeals concluded that the only evidence presented by Brown to support his claim of constructive discharge was identical to the evidence supporting failure to promote. The court ignored specific

evidence proving constructive discharge, including evidence outlined by the trial court in its opinion, and disregarded the reasonable inferences in Brown's favor which the jury was entitled to make in judging the weight of the evidence.

Constructive discharge evidence is analyzed in light of the seven factors listed in *Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292, 297 (5th Cir. 1994): (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment or humiliation calculated to encourage the employee's resignation; or (7) offers of early retirement [or continued employment on terms less favorable than the employee's former status]. Only one of these factors need be present in order to support a finding of constructive discharge. *See id.*

In the present case, the record reflects that at least five of the *Barrow* factors for constructive discharge were supported by the evidence. For instance, Brown was told he was being promoted when in fact he received a demotion (Factor 1) which resulted in a reduction in salary (Factor 2). (Tr. at 333-337.) After he voiced concerns of being discriminated against, he was transferred to a store plagued with violence, curfews and losses (Factor 4). (Tr. at 112-113, 254-256, 299.) The harsh subjective evaluations and audits which deprived Brown of promotions and pay raises amounted to behavior that is at least as pernicious as badgering or harassment, and the overall message Foot Locker sent to Brown over a period of several years, that his race rendered him incompetent to manage certain stores, was humiliating (Factor 6). (Tr. at 100, 135-138, 309-10.) Although Brown was offered a higher volume ethnic store immediately before he filed his EEOC complaint, after his complaint, he was told he was no longer promotable, (Tr. at 141), and, after years of prior service, would have to start all

over again. (Factor 7). (Tr. at 95.) This evidence is not identical to the evidence of failure to promote. Had the court of appeals applied the proper standard, drawing all reasonable inferences in favor of Brown, the court should have concluded that the evidence supported a finding of constructive discharge.

This Court has stated that "[a]ll courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). A judgment for a plaintiff should be overturned only if it is concluded that "'no rational jury could have found for the plaintiff.'" *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 948 (7th Cir. 1998), *citing Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627, 630 (7th Cir. 1996). This standard is applied stringently in discrimination cases where witness credibility is often crucial. *Id.* The court of appeals in *Hybert v. Hearst Corp.*, 900 F.2d 1050, 1054 (7th Cir. 1990), acknowledged that "we are particularly careful in employment discrimination cases to avoid supplanting our view of the credibility or weight of the evidence for that of both the jury (in its verdict) and the judge (in not interfering with the verdict)."

Despite the stringent review that is supposed to be conducted in discrimination cases, the court of appeals in this case held that Brown's move to the Fort Worth Town Center was not a reduction of responsibility, that the store deteriorated only under his management, that his work was not degrading or menial and that he was not subjected to badgering or harassment designed to encourage his resignation. Applying the appropriate standard of review, the court of appeals Panel was not free to draw such inferences from the record.

III. THE PANEL'S REVERSAL OF THE ENTIRE DAMAGES AWARD CONFLICTS WITH THE FIFTH CIRCUIT'S RECENT HOLDING IN *HARDIN v. CATERPILLAR, INC.* AND WAS ERROR.

Assuming the court of appeals properly concluded that the jury awarded damages for constructive discharge and that the evidence did not support a finding of constructive discharge as a matter of law, the court erred in reversing the entire damages award. The jury's verdict form separated the actual damages into three categories: (a) "loss of wages and benefits from the date of the defendant's discriminatory conduct until the present;" (b) "loss of value of earning capacity from this date into the future;" and (c) "emotional pain ... from the date of the onset of the discrimination until the present date." In the instruction to Question 2, the court's instruction relating to constructive discharge carefully limited it to parts (a) and (b). It made no reference to the award for mental anguish, nor was it referred to in the award for punitive damages.

In holding that a remand on all issues of damages was required, the court of appeals cited *Hardin v. Caterpillar Inc.*, 227 F.3d 268 (5th Cir. 2000). *Hardin* found there was a practical inseparability of the issues of intent, damages for emotional injuries and punitive damages. *Id.* at 272. The court arrived at this holding because it believed that a jury, in deciding whether to award punitive damages and the amount, responds to the evidence of intentional acts and the perceived level of emotional injury in awarding appropriate compensation. *Id.* at 273. Here, the court expressed concern that the jury's finding of compensatory damages in answer to 2(a) and 2(b) may have included damages for constructive discharge. However, the finding of intentional discrimination was affirmed, and damages for emotional injuries and punitive damages, which are tied together according to *Hardin*, have not been disturbed by the court of appeals.

Since the award of the emotional injury and punitive damages flow from the affirmed finding of intentional discrimination and not from the compensatory damages, these should not be reversed for a new trial. If compensatory damages were based on constructive discharge and constructive discharge was not supported by the evidence, then this case should be remanded for consideration of compensatory damages only and not emotional and punitive damages. The trial court on remand can best address any concern relating to the linkage of actual and punitive damages in locating caps for punitive awards after a resolution by the jury of compensatory damages.

IV. 42 U.S.C. SECTION 1981 AND TITLE VII WERE BOTH SUPPORTED BY THE JURY VERDICT.

The court of appeals implied in footnote 3 of its opinion that Brown has waived his Section 1981 claims by not requesting specific jury instructions. However, neither the instructions nor the verdict form referenced either Title VII or Section 1981. The jury was only instructed as to the burden of proof to find race discrimination, without being informed as to the specific statutory bases for Brown's claim. The elements of Title VII and Section 1981 are parallel, and a verdict on the issue of liability under Title VII is conclusive on Section 1981 and vice versa. *Heno v. Sprint/United Management Co.*, 208 F.3d 847, 852 (10th Cir. 2000). *See also Meade v. Merchants Fast Motorline, Inc.*, 820 F.2d 1124 (10th Cir. 1987). Therefore, the court of appeals' affirmance of Brown's failure to promote claim should have and did support a judgment for the alternative claim arising out of 42 U.S.C. Section 1981.

CONCLUSION.

For all of the reasons stated in this petition, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Fifth Circuit and, ultimately, reverse that part of the court of appeals' judgment reversing the judgment of the district court and remanding for a new trial on the issue of compensatory, punitive and emotional damages.

Respectfully submitted,

David Brenner
Kristin L. Lemke
BURNS ANDERSON
JURY & BRENNER,
L.L.P.
4807 Spicewood Springs
Road, Bldg. 4, Floor 2
Austin, Texas 78759
(512) 338-5322

(Any footnotes trail end of each document)

No. 99-50493

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LLOYD BROWN,
Plaintiff - Appellee-Cross-Appellant,

versus

KINNEY SHOE CORP., doing business as Foot Locker, doing business as ASF/Foot Locker, doing business as Champs Sports, doing business as Lady Foot Locker, doing business as Susie's, doing business as Athletic X-Press,
Defendant - Appellant-Cross-Appellee.

January 15, 2001, Decided

COUNSEL:
For LLOYD BROWN, Plaintiff - Appellee-Cross-Appellant: David L. Brenner, Kristin Lee Lemke, Burns, Anderson, Jury & Brenner, Austin, TX.

For KINNEY SHOE CORP, Defendant - Appellant-Cross-Appellee: Stuart Mallory Reynolds, Jr, Steven A Siegel, Jerry Hicks, Winstead, Sechrest & Minick, Dallas, TX.

JUDGES:
Before JOLLY, SMITH, and BARKSDALE, Circuit Judges.

OPINION BY:
E. GRADY JOLLY

OPINION:

E. GRADY JOLLY, Circuit Judge:

This appeal presents a challenge to various aspects of a jury trial that resulted in a finding of intentional racial discrimination in violation of Title VII. The plaintiff, Lloyd Brown, brought this Title VII action against his former employer, Kinney Shoes, d/b/a Foot Locker, ("Foot Locker"). He alleged racial discrimination based on Foot Locker's failure to promote him to a managerial position in a "non-ethnic store." Ultimately, the jury found Foot Locker liable and awarded Brown $ 69,493 in past and future wages, $ 21,500 in mental anguish damages, and $ 250,000 in punitive damages, plus costs and attorney's fees. The district court entered a judgment in favor of Brown, but reduced his damages by $ 1160 to meet the statutory cap. On appeal, Foot Locker seeks review of (1) the district court's failure to conduct a Batson inquiry, (2) a number of evidentiary rulings, and (3) the sufficiency of the evidence to support the jury's verdict. Brown seeks review of the district court's rulings on damages, attorney's fees, and a jury instruction on spoliation.[1] We reject Foot Locker's Batson and evidentiary claims. We also conclude that the evidence is sufficient to support Brown's failure to promote claim. The evidence is not sufficient, however, to support his claim for constructive discharge. While upholding liability for the failure to promote claim, we remand for a new trial on damages, including compensatory, emotional, and punitive damages.

I

A

Lloyd Brown, who is black, worked for Foot Locker from February 1989 to December 1995. He began his management career with Foot Locker in October 1990 in the Killeen Mall store. Soon after assuming a management position, Brown perceived and was told by other black managers that black managers were not hired to manage "non-ethnic stores," and, further, that the managers of "non-ethnic stores" were more

often promoted to district manager positions.[2] Additionally, Brown testified that he began to notice that the black managers were subject to harsher reviews and audits than were white managers.

In 1993, following Brown's request to be transferred to a "non-ethnic store," he was promoted to manager of the Town Center Mall store in Fort Worth, Texas. The Town Center Mall store, however, like the Killeen Mall store, was an "ethnic store." The sales volume of the Town Center Mall store was $1.1 million for the year before Brown's arrival. Although conditions at the Town Center Mall store were, concededly, anything but ideal (because of problems with crime, the imposition of a curfew, and store vacancies), the evidence at trial established that Brown had a difficult time managing the store. Sales dropped from $1.1 million to $ 980,000 in 1993. By 1995, sales had dropped to $577,000 under Brown's management. In 1996, however, Brown was able to increase sales to approximately $609,000. In addition to declining sales, Brown also received critical evaluations from Jan Balder, his district supervisor, and from store auditors. The critical evaluations stemmed from Brown's problem with "shrinkage," that is, store inventory unaccounted for.

In early 1995, Brown moved his family from Fort Worth to Austin, Texas, so that they would be closer to his wife's mother. Sometime after moving his family to Austin, Brown applied for a transfer to one of Foot Locker's two new stores under construction in Austin. Both of these stores were categorized as non-ethnic stores.

The first store, the Lakeline Mall store, was projected as a $900,000 volume store. At trial, there was conflicting testimony regarding why Brown was not offered a managerial position at the Lakeline Mall Store. District Manager Balder testified that Brown was denied a transfer to this store because it would have constituted a promotion,

when he was not promotable given the drop in sales to just over $600,000 at the Town Center Mall store. Instead, Foot Locker promoted Mike Zoiber, a white male, who, Foot Locker argued at trial, was more qualified based on his work evaluations. Brown offered testimony, which the jury apparently believed, demonstrating that Zoiber was less qualified based on the fact that he had only one year's experience as a manager at a "rookie" store, a store smaller than Brown's Town Center Mall store. Additionally, in response to Foot Locker's assertion that he was not promotable, Brown testified that after he was denied the Lakeline Mall job he was offered a managerial position at a Fort Worth Outlet Mall store, a store with a sales volume of $ 1.4 million to $1.6 million. The Fort Worth Outlet Mall store had an "ethnic store" classification. To support this testimony, Brown offered the testimony of the manager of the Outlet Mall store, Joe Maldonado, who stated that when Balder offered him the job she indicated that he (Maldonado) was the second choice for the job in that Brown had already declined the offer. Balder denies having offered a managerial position at the Outlet Mall to Brown. The jury, however, was entitled to reject her testimony, and apparently did.

The second store, the Barton Creek Square Mall store, was a $400,000 to $500,000 volume store. Foot Locker offered evidence establishing that Brown was denied a transfer to this store because it was classified as a "rookie" store for entry level managers only. Ultimately, Martin Rhoads, a Hispanic male manager with no previous management experience, was hired by Foot Locker to manage the store.

By November 1995, Brown had become frustrated by his inability to secure a promotion or even a transfer to a "non-ethnic store." Consequently, he filed a race discrimination charge with the EEOC. While the charge was pending, in early 1996, a new district manager was assigned to Brown's region, and Brown again expressed to his new manager his

desire to be transferred/promoted to a "non-ethnic store." The manager told Brown that he would have to prove himself. Because of this conversation, and Foot Locker's continual refusal to transfer/promote him, Brown resigned from Foot Locker.

B

On November 26, 1997, Brown filed this Title VII action against Foot Locker alleging intentional race discrimination. n3 Following a somewhat lengthy trial, the jury returned a verdict for Brown finding intentional race discrimination and awarding him $340,000 in damages.[4] Additionally, the court awarded Brown costs and attorney's fees in the amount of $ 148,339.44.

Foot Locker moved to set aside the verdict under Federal Rule of Civil Procedure 50, and the court denied its request. Foot Locker then filed this appeal. Foot Locker seeks review of: (1) the district court's failure to conduct a Batson inquiry following its timely objection to Brown's use of all of his peremptory strikes on white jurors; (2) the grant of one of Brown's Batson challenges; (3) the denial of Foot Locker's motion for judgment on the issue of intentional discrimination; (4) the denial of Foot Locker's motion for judgment on the issue of constructive discharge; (5) a series of evidentiary rulings centering on the refusal of the court to allow Foot Locker to offer testimony regarding its use of merchandising codes, and the reasons why Brown was not promoted; (6) the entry of judgment for punitive damages in the absence of any evidence of malice or reckless disregard; and (7) the entry of judgment for damages for emotional distress in the absence of any evidence of particular injuries suffered by Brown.

Brown cross-appeals. He seeks review of the district court's reduction of punitive damages and denial of supplemental attorney's fees. If the case is reversed or

remanded, Brown also seeks review of the district court's denial of his requested jury instruction on spoliation.

II

Foot Locker challenges both the district court's refusal to conduct a full Batson inquiry in response to its challenge of Brown's peremptory strikes, and the court's decision to sustain Brown's Batson challenge to Foot Locker's peremptory strike of a black juror.

A

We first address Foot Locker's claim that the district court failed to fulfill its duty to conduct a Batson inquiry. The law is now well settled: "A party to a civil suit can challenge another party's use of a peremptory strike that excludes a prospective juror on the basis of that juror's race." Greater Plains Equipment, Inc. v. Koch Gathering Systems, Inc., 45 F.3d 962, 964 (5th Cir. 1995)(citing Edmonson v. Leesville Concrete Co., 500 U.S. 614, 114 L. Ed. 2d 660, 111 S. Ct. 2077 (1991); Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986)). In Batson, the Supreme Court held that equal protection principles prohibit a prospective juror from being peremptorily challenged on the basis of his or her race. See Batson, 476 U.S. at 86-87 (stating that by denying a person participation in jury service on account of race, the offending party "unconstitutionally discriminated against the excluded juror"). The Batson Court reasoned that while it is clear that "an individual juror does not have a right to sit on any particular petit jury, . . . he or she does possess the right not to be excluded from one on account of race." United States v. Huey, 76 F.3d 638, 640 (5th Cir. 1996)(citing Batson, 476 U.S. at 87).

We have developed a three-step process for evaluating Batson challenges:

> First, the complaining party must make a prima facie showing that opposing counsel has exercised a peremptory challenge on the basis of race. Once this showing has been made, the burden shifts to the striking party to articulate a race-neutral explanation for the strike. Thereafter, the court must determine whether the Batson claimant has proven purposeful discrimination.

Great Plains Equipment, 45 F.3d at 964-65 (citing United States v. Bentley-Smith, 2 F.3d 1368, 1373 (5th Cir. 1993)). Once a court has called on counsel to provide race-neutral justifications for the use of peremptory strikes, we review only the district court's finding of discrimination, not whether the party has made a prima facie case. United States v. Forbes, 816 F.2d 1006, 1010 (5th Cir. 1987). If the trial court determines that a party failed to make a prima facie showing, however, opposing counsel is not required to come forward with a neutral explanation for the challenges. Soria v. Johnson, 207 F.3d 232, 239 (5th Cir. 2000).

To establish a prima facie case, a party is required to show that the circumstances surrounding the peremptory challenges raise an inference of purposeful discrimination. Batson, 476 U.S. at 96; Soria, 207 F.3d at 237. The trial court should consider all relevant circumstances in determining whether a prima facie Batson violation can be established. McGinnis v. Johnson, 181 F.3d 686, 691 (5th Cir. 1999). Factors that give rise to an inference of discrimination include, among others, a pattern of strikes against jurors of a certain race and the party's statements and questions during voir dire. United States v. Branch, 989 F.2d 752, 755 (5th Cir. 1993). "A prima facie case of racial discrimination requires a defendant to 'come forward with facts, not just numbers alone.'" Id. (quoting United States v. Moore, 895 F.2d 484, 485 (8th Cir. 1990)). In this circuit, a trial court's

determination that a party has failed to make a prima facie showing is accorded a "presumption of correctness, which can only be rebutted by 'clear and convincing evidence.'" Soria, 207 F.3d at 238. See also Branch, 989 F.2d at 755 ("a finding that appellants did not make a prima facie case of discrimination under Batson . . . is reviewed for clear error").

A party that does not raise facts or make timely Batson claims in the district court waives the right to raise them on appeal. See Branch, 989 F.2d at 755 n.2 ("On appeal, appellants have noted facts in alleged support of their Batson claim. We may not consider them. . . . The failure to enunciate these facts in the district court amounts to a waiver"). Thus, it is important that the district court afford the parties ample opportunity to create a Batson record. As the Eighth Circuit has noted,

> a defendant who requests a prima facie finding of purposeful discrimination is obligated to develop a record, beyond numbers, in support of the asserted violation. And the district court . . . must give the defendant a reasonable opportunity to do so. Such a record will allow the appellate court to review the findings at issue.

United States v. Dawn, 897 F.2d 1444, 1448-49 (8th Cir. 1990).

B

On appeal, Foot Locker argues that the district court committed reversible error by completely disregarding the three-step procedure for evaluating Batson claims and by summarily denying its challenge. Specifically, Foot Locker argues that it raised a timely objection, that it made a prima facie case of discrimination, and that the judge erred by

failing to require Brown to give race-neutral reasons for his peremptory strikes.

Brown responds by arguing that Foot Locker failed to carry its burden under the first prong of the Batson test, that is, Foot Locker failed to make a prima facie showing that the challenges were exercised on the basis of race. Brown argues that by failing to require race-neutral explanations, the court made a determination that Foot Locker did not make a prima facie case of discrimination.

In truth, the trial court made no explicit findings at all. It summarily dismissed Foot Locker's Batson claim without allowing Foot Locker to attempt to make a prima facie case. In response to Foot Locker's Batson challenge for Brown's use of peremptory challenges against four white jurors, the court's only response was, "Well, that objection is overruled." Because the district court made no explicit findings and did not allow Foot Locker to state the reasons for its objection, there is no record on which to rely to determine whether Foot Locker made a prima facie case.

On appeal, Foot Locker only argues that it established a prima facie case. It does not argue either that the district court did not afford it an opportunity to make a prima facie case n5 or that the district court made no finding on the issue. As such, we must review whether Foot Locker made a prima facie case when it presented its claim to the district court. The district court's determination is entitled to a presumption of correctness.

At the time of the Batson objection, Foot Locker objected only on the basis that Brown used his four peremptories on white jurors. Standing alone, these numbers do not make a prima facie case. Foot Locker did not present other facts that could have led the court to find an inference of discrimination. Although the facts in this case--a white supervisor accused of discrimination against a black salesman on the basis of race, the fact that race was an issue

during voir dire, and the fact that the plaintiff used all four of its strikes on white jurors (the jury pool consisted of 12 whites, 3 blacks, and 1 Hispanic)--suggest that Foot Locker might have made a more convincing showing for a prima facie case, it did not present and argue these facts in support of its claim. Instead, Foot Locker raised only the race of the struck jurors. On this basis, we cannot say that the district court was clearly erroneous in rejecting the Batson challenge. Although the record before us contains no articulated findings by the district court and no argument by counsel on the issue, we can only conclude that the district court considered that 75 percent of the jury pool was white and found no inference of discrimination from the scant facts to which counsel alluded--strikes against four white jurors. Therefore, the district court's finding that Foot Locker failed to make a prima facie case of discrimination was not clearly erroneous.

C

Foot Locker also appeals the trial court's decision to sustain Brown's Batson challenge to Foot Locker's peremptory strike of one of three black jurors on the panel. During jury selection, Foot Locker first attempted to strike two of the black jurors for cause, stating that one of the jurors, juror Sims, believed that he had been the defendant in a frivolous lawsuit, and that the other juror had worked for the first juror, who might unduly influence her. After the court refused the cause challenge, Foot Locker used two of its four peremptories to strike juror Sims and the other black juror on the sixteen person venire, juror Brown, who had not been challenged for cause. After Brown challenged the strike on Batson grounds, the court asked Foot Locker to state its reasons for striking the jurors. Foot Locker articulated a reason for striking juror Sims--he had been involved in a lawsuit and would be hostile to litigants--but the district court found it pretextual, and sustained the Batson challenge. Finding that Foot Locker's neutral reasons were adequate

with respect to juror Brown, however, the court allowed the juror to be struck.

Although explanations are generally considered to be race-neutral unless the discriminatory intent is inherent in the explanation, this determination depends in significant part on an evaluation of the credibility and demeanor of the attorney exercising the challenge. Thus, the district court's determination that a party used peremptory strikes in a discriminatory manner is entitled to deference, and should not be overturned absent clear error. United States v. Kelley, 140 F.3d 596, 606 (5th Cir. 1998).

On the record before us, we cannot say that the district court was clearly erroneous in concluding that Foot Locker's explanation for challenging juror Sims was pretextual. Foot Locker challenged all three black venire members, either by peremptory strike or for cause. Although Foot Locker claimed that it used its peremptory to strike juror Sims because it was worried that his prior experiences with litigation would influence him, it did not challenge two white jurors who had also been parties to litigation. Given these facts, we will not disturb the district court's finding that Foot Locker evinced purposeful discrimination in striking juror Sims. We now turn to the merits of the appeal.

III

As an initial matter, we must examine the essence of Brown's claims. Brown claims that Foot Locker intentionally discriminated against him based on his race during the course of his employment. The facts, as presented by Brown, encompass both a failure to promote (or transfer) claim, and a constructive discharge claim. These two claims, however, were not clearly separated at trial. The same evidence was presented to support both claims. The jury instructions on the issue of intentional discrimination did not discuss the elements of constructive discharge;[6] to be sure, constructive discharge was not addressed until the instruction on the

award of damages. The verdict form did not distinguish the two issues for the jury; it asked "do you find from a preponderance of the evidence that Defendant Foot Locker discriminated against Mr. Brown based on his race?" Despite this consolidation of failure to promote and constructive discharge at trial, we must separate these two jury issues to determine whether there is sufficient evidence to support the jury award.

Foot Locker contends that the district court erred in denying its motion for judgment on the issues of, first, intentional discrimination, which we interpret as failure to promote, and second, constructive discharge. Foot Locker argues that Brown provided no evidence to show that Foot Locker's reasons for failing to promote Brown were pretextual, or to show that Foot Locker made a calculated effort to pressure him into resignation.

We review the denial of a party's motion for judgment as a matter of law de novo, applying the same standard that the district court used. Rutherford v. Harris County, Texas, 197 F.3d 173, 178 (5th Cir. 1999). "The district court properly grants a Rule 50 motion for judgment as a matter of law only where the facts and inferences indicate a particular outcome so strenuously that reasonable minds could not disagree." Aguillard v. McGowen, 207 F.3d 226, 228-29 (5th Cir. 2000). In deciding a Rule 50 motion, the court should consider all the evidence in the light most favorable to the non-moving party. Id. at 228. "A jury verdict must be upheld unless 'there is no legally sufficient evidentiary basis for a reasonable jury to find' as it did." Vadie v. Mississippi State Univ., 218 F.3d 365, 372 (5th Cir. 2000) (quoting Fed. R. Civ. P. 50(a)(1)). Even if this court would reach a different conclusion as trier of fact, "we are not free to reweigh the evidence or to re-evaluate credibility of witnesses." Hiltgen v. Sumrall, 47 F.3d 695, 699 (5th Cir. 1995).

A

We start with the basics. To succeed on his Title VII intentional discrimination claim, Brown must prove by a preponderance of the evidence that he was denied employment opportunities because of his race. "An employer is entitled to judgment as a matter of law on this ultimate question 'if the evidence taken as a whole would not allow a jury to infer that the actual reason for the [employer's decision] was discriminatory.'" Vadie, 218 F.3d at 372 (quoting Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1996) (en banc)). After a case has been fully tried on the merits, as has this one, the inquiry shifts from a focus on whether the plaintiff has made a prima facie case of race discrimination to the question of whether the record contains sufficient evidence to support the jury's finding of race discrimination. Harrington v. Harris, 118 F.3d 359, 367 (5th Cir. 1997). Thus, the question is whether the evidence was sufficient for the jury to find that Brown was not promoted because of his race.

Foot Locker contends that the evidence indisputably showed that Brown had not performed well enough to qualify for a promotion to a higher volume store, that he was less qualified than the individual who did get the promotion, and that he would not have been well placed in a lower volume store. Furthermore, Foot Locker argues that the cases indicate that courts should be deferential to the judgment of employers in making promotion decisions in their businesses. See Odom v. Frank, 3 F.3d 839, 847 (5th Cir. 1993) (noting that judges should be reluctant to substitute their own views unless disparities are "so apparent as virtually to jump off the page and slap us in the face"). Brown counters Foot Locker's claim with evidence of strong evaluations, and more years of management experience than the individual who was selected. Brown also testified that, although not spoken at the time, he would have been willing to accept a pay cut to manage the smaller non-ethnic store.

Brown also introduced evidence attempting to show that Foot Locker's method of promoting managers systematically treated black candidates differently. The evidence showed that, for merchandising purposes, Foot Locker classified its stores based on the racial makeup of each store's customer base. The evidence also showed that, generally, black managers were not promoted to management positions in non-ethnic stores.[7] There was testimony, conclusionary in nature, that also suggested that white managers were promoted more frequently and that black managers were evaluated more harshly.

Brown also introduced evidence to show that Foot Locker's reasons for failing to promote Brown out of the ethnic store--that the alternative stores were either too big or too small for his experience level--were pretextual. Brown testified that Foot Locker offered to promote him to a 1.4 to 1.6 million dollar ethnic store, but refused to promote him to either a 900,000 dollar or a 300,000 to 500,000 dollar non-ethnic store. Another Brown witness corroborated this testimony. Foot Locker presented evidence that it never offered him management of the 1.4 million dollar store, directly contradicting Brown's testimony.

Although much of the evidence is conflicting, it is legally sufficient for a jury to find intentional discrimination. The jury, exercising its function of determining facts and weighing credibility, was free to believe Brown's testimony and evidence over the evidence offered by Foot Locker. Brown introduced evidence that white managers with similar evaluations were promoted to non-ethnic stores, and evidence suggesting that black managers were generally not chosen to manage non-ethnic stores. Brown testified that despite requesting positions at non-ethnic stores on multiple occasions, he was denied the opportunity to manage a non-ethnic store, although he was apparently promotable to ethnic stores. Based on that, and similar evidence, the jury could have concluded that Foot Locker's claim that Brown was not

qualified for the higher volume store was pretextual, and that Foot Locker intentionally discriminated against Brown by not promoting him to a non-ethnic store.

B

Foot Locker also appeals the district court's denial of Foot Locker's motion for judgment on constructive discharge. As we pointed out earlier, Brown was not discharged. He resigned. A resignation is actionable under Title VII, allowing the plaintiff to seek compensatory damages for events after the resignation, only if the resignation qualifies as a constructive discharge. To prove a constructive discharge, a "plaintiff must establish that working conditions were so intolerable that a reasonable employee would feel compelled to resign." Faruki v. Parsons, 123 F.3d 315, 319 (5th Cir. 1997). In determining whether a reasonable employee would feel compelled to resign, we have considered the relevancy of the following events:

> (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement [or continued employment on terms less favorable than the employee's former status] . . .

Brown v. Bunge Corp., 207 F.3d 776, 782 (5th Cir. 2000) (alteration in original) (quoting Barrow v. New Orleans Steamship Ass'n, 10 F.3d 292, 297 (5th Cir. 1994)). Constructive discharge requires a greater degree of harassment than that required by a hostile environment claim. Benningfield v. City of Houston, 157 F.3d 369, 378 (5th Cir.

1998). Discrimination alone, without aggravating factors, is insufficient for a claim of constructive discharge, as is a discriminatory failure to promote. Boze v. Branstetter, 912 F.2d 801, 805 (5th Cir. 1990); Landgraf v. USI Film Productions, 968 F.2d 427, 429-30 (5th Cir. 1992), aff'd, 511 U.S. 244, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994).

Brown contends that he resigned because he was repeatedly denied promotions and transfer opportunities. He also contends that his 1993 transfer to the Fort Worth Town Center Mall was actually a demotion--not the promotion he was promised--because the store was continually losing money. Because the Fort Worth Town Center Mall store lost revenue while he was manager, Brown further testified that he lost ten to fifteen thousand dollars in salary and bonuses.

These facts, without more, are insufficient for a finding that a reasonable employee in Brown's position would have felt compelled to resign, particularly in light of the fact that he was pursuing an EEOC remedy that could have addressed any discrimination he suffered in failing to be promoted or transferred. Although, in hindsight, it is clear that Brown's transfer to the Fort Worth Town Center Mall did not result in the benefits of a promotion, Brown did not lose responsibilities by moving to that store. He was indeed the manager of a larger store initially, which deteriorated only under his management (for which, it is true, he may not have been wholly blameworthy). His work was not degrading or menial, and he was not subjected to badgering or harassment designed to encourage his resignation. In fact, Brown himself testified that he was offered a promotion to a 1.4 million dollar store shortly before he resigned. In essence, Brown's resignation, as a matter of law, was not justified by working conditions that had become so intolerable that no reasonable person could have worked there under those conditions. We therefore reverse the district court's denial of Foot Locker's motion for judgment as a matter of law on the issue of constructive discharge and any damages resulting therefrom.

This reversal, however, does not affect our holding affirming liability on Brown's failure to promote claim. Although the jury verdict form did not separate Brown's failure to promote and constructive discharge claims--instead, simply finding Foot Locker liable for racial discrimination--the constructive discharge aspect of the claim is supported only by the evidence concerning Brown's failure to be transferred or promoted. Brown claimed that he was constructively discharged because he was denied transfers and promotions to non-ethnic stores. Thus, in finding that Foot Locker intentionally discriminated against Brown, the jury necessarily found that Brown was denied transfers and promotions, or other advancement opportunities, based on his race. As we have earlier noted, the evidence supports such a finding. The jury verdict is therefore sufficient to uphold Foot Locker's liability on Brown's failure to promote claim. The compensatory damage award, however, obviously included damages relating to both the constructive discharge claim and the failure to promote claim. No compensatory damages that may be based on the claim of constructive discharge can stand. Thus, the case must be remanded for a new trial on compensatory damages.

IV

Furthermore, Foot Locker specifically appeals the award of both punitive damages and damages for emotional distress. In this appeal, however, we will not address these specific damage awards. Because we have overturned the finding of constructive discharge, all damages, including punitive and emotional, must be supported by the failure to promote or transfer claim alone. A new determination of the compensatory injuries that flow from the claim may fundamentally affect a jury's determination of emotional and punitive damages. See Hardin v. Caterpillar, 227 F.3d 268, 272-73 (5th Cir. 2000) (noting the "practical inseparability of the issues of intent, of damages for emotional injury, and of punitive damages" and that legal systems reflect the "linkage

of actual and punitive damages in locating caps for punitive awards"). Thus, all damages must be reconsidered. We therefore remand for a retrial on the issue of compensatory, punitive and emotional damages that flow from the failure to promote.

V

Finally, we find no reversible error in the evidentiary issues contested by Foot Locker. We have affirmed the district court's judgment on liability for intentional discrimination based on failure to promote, thus, there is also no need to address Brown's proposed jury instruction on spoliation. We will not address Brown's request for additional attorney's fees, the final issue presented in this appeal. The appropriateness of additional attorney's fees will be more properly addressed at the conclusion of this remand.

VI

Because we find that the district court properly denied Foot Locker's motion for judgment as a matter of law on the issue of failure to promote, but should have granted Foot Locker's motion for judgment as a matter of law on the issue of constructive discharge, we AFFIRM in part, REVERSE in part, and REMAND for a retrial on the issue of damages.

AFFIRMED in part; REVERSED in part; and REMANDED.

[1] Brown introduced evidence that Foot Locker destroyed documents on the ethnic classification of its stores.

[2] A considerable amount of time at trial was spent on the issue of how Foot Locker classified its Texas stores.

[3] In his original complaint, Brown alleged claims pursuant to 42 U.S.C. § 1981 and the Texas Labor Code. However, at the charge conference, the district court referred to Brown's claims as only brought pursuant to Title VII. Brown made no attempt to correct the district court during

the charge conference. Additionally, Brown did not object to the district court's instructions to the jury limited to Title VII.

[4] Specifically, the jury awarded Brown $39,833 for loss of wages and benefits from the date of the defendant's discriminatory conduct until the present; $29,660 for loss of value of earning capacity from this date into the future caused by the defendant's discriminatory conduct; $21,500 for emotional pain, suffering, mental anguish and the loss of enjoyment of life; and $250,000 in punitive damages.

[5] By not giving Foot Locker a full opportunity to make a Batson record to establish its prima facie case, and by not making any findings of its own, the district court did not discharge its duty under Batson. As the Ninth Circuit found in a similar case,

> the district court[] clearly disregarded . . . even the most basic of Batson safeguards in summarily overruling, with absolutely no inquiry or discussion [the plaintiff's] Batson objection . . . In so doing, the district court precluded [the plaintiff] from stating, let alone proving, what appears evident from the defendants' use of . . . their . . . peremptory challenges . . .

Montiel v. City of Los Angeles, 2 F.3d 335, 340 (9th Cir. 1993).

[6] The district court's jury instruction read as follows:

> It is unlawful for an employer to discharge or otherwise discriminate against an employee because of the employee's race. In order for Mr. Brown to prevail on his claim against

> Foot Locker, he must prove by a preponderance of the evidence that his race was a motivating factor in any of Foot Locker's adverse employment decisions. An adverse employment decision is any decision by an employer such as Foot Locker that negatively affects an employee such as Mr. Brown with respect to compensation, tenure, conditions or privileges of employment. Taking adverse employment action toward an employee who is black is not illegal if the reasons for doing so are unrelated to the employee's race. Therefore, the fact that Mr. Brown is black and Foot Locker took adverse employment actions towards him is not sufficient, in and of itself, to establish his claim under the law. Similarly, the fact that Foot Locker may have mistreated the Plaintiff or made an unwise decision regarding the Plaintiff's employment is not sufficient to establish the Plaintiff's claim under the law. Finally, simply because you do not agree with the employment decisions made by Foot Locker or the manner in which the decisions were made is not sufficient to establish Plaintiff's claims under the law. You must find that an adverse employment decision was made by Foot Locker because of Mr. Brown's race in order to answer "yes" to Question One.

[7] The evidence on promotion to non-ethnic stores was primarily anecdotal, because most of Foot Locker's documentation on the ethnic classification of stores was destroyed, allegedly pursuant to Foot Locker's document retention policies.

No. A 97 CA 859 SS

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN

LLOYD BROWN,
Plaintiff,

versus

KINNEY SHOE CORP., doing business as Foot Locker, doing business as ASF/Foot Locker, doing business as Champs Sports, doing business as Lady Foot Locker, doing business as Susie's, doing business as Athletic X-Press,
Defendant.

Filed 3/26/99

ORDER

BE IT REMEMBERED that a jury trial was held in the above-styled cause before a duly empaneled jury selected on February 1, 1999. This employment discrimination trial began on February 8, 1999 and ended with a jury verdict on February 11, 1999. The jury found liability against the defendant and assessed compensatory damages in the amount of $39,833 for past lost wages, $29,660 for loss of future earning capacity, and $21,500 for emotional pain and mental anguish in the past; and punitive damages in the amount of $250,000, for a total award of $340,993. Before the Court are Plaintiff's Motion for Judgment [#81], Plaintiff's Motion for Assessment of Attorney Fees and Costs [#82]; Foot Locker's Motion for Judgment [#85], Defendant's Objection to Plaintiff's Motion for Attorneys' Fees [#86]; and Plaintiff's Response to Defendants' Motion for Judgment.fn1 After consideration of the motions, the briefs, the evidence offered

at trial, and the applicable law, the Court enters the following opinion and orders.

I. Cross Motions for Judgment

A. Background

The plaintiff requests that the Court enter a judgment on the jury verdict, and the defendant argues the Court should overrule the jury verdict and/or reduce the amount of the jury award as a matter of law. Specifically, the defendant argues (1) the evidence did not support an award of punitive damages; (2) the amount of punitive damages awarded by the jury was excessive; (3) the plaintiff provided insufficient evidence to support an award of damages for mental anguish and emotional damages; (4) the plaintiff offered insufficient evidence of constructive discharge; and (5) the plaintiff provided insufficient evidence of intentional discrimination based on the race of the plaintiff.

The standard for analyzing a judgment notwithstanding the verdict ("judgment n.o.v.") is governed by Rule 50 of the Federal Rules of Civil Procedure, which refers simply to "judgment as a matter of law." See Durish v. Uselton, 763 F. Supp. 192, 195 (M.D. Tex. 1990). "A motion for judgment as a matter of law... in an action tried by a jury is a challenge to the legal sufficiency of the evidence supporting the jury's verdict." Scott v. University of Miss., 148 F.3d 493, 503 (5th Cir. 1998) (quoting Harrington v. Harris, 118 F.3d 359, 367 (5th Cir.), cert. denied, 118 S. Ct. 603 (1997)).

> A judgment n.o.v. should be granted only when the facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict. The court

> considers all the evidence—not just the evidence that supports the nonmovant's case—in the light most favorable to the nonmovant and indulges all reasonable inferences in favor of the nonmovant. If there is substantial evidence opposed to the motion, the motion should be denied. Substantial evidence means evidence of such quality and weight that reasonable and fairminded persons in the exercise of impartial judgment might reach different conclusions. A mere scintilla of evidence is insufficient to present a question for the jury.

Farpella-Crosby v. Horizon Health Care, 97 F.3d 803, 805-06 (5th Cir. 1996) (citations omitted) "[A] court should grant a motion for judgment as a matter of law not only when the non-movant presents no evidence, but also when there is not a sufficient conflict in substantial evidence to create a jury question." Scott, 148 F.3d at 504 (quotations omitted).

The evidence provided to the jury in this case presented a situation in which Foot Locker classified its stores with racial codes and gave insufficient explanation of how or why it assigned those racial codes. Instead, the evidence and argument Foot Locker offered suggested a cover-up complete with document shredding. The evidence further revealed that although Foot Locker employed black store managers, those black managers were not provided fair opportunities to manage non-black stores. The evidence also suggested black managers were given harsher subjective evaluations and targeted with stricter audits than white managers. Most importantly, the evidence demonstrated Brown was a competent manager who was banished to an undesirable store and given harsh subjective evaluations after he made it known he wanted an opportunity to manage non-black stores. Brown was nevertheless offered a promotion to

a high-volume ethnic store while being denied promotions to two non-ethnic stores—one because it was "too big" and Brown was not "promotable"; and one because it was "too small" and would be a "demotion" for Brown. In its motion for judgment as a matter of law, Foot Locker urges the Court to look past this avalanche of evidence suggesting reprehensible, intentional discrimination and instead accept all Foot Locker's evidence at face value—the opposite of the correct standard for a judgment as a matter of law, which looks at the non-movant's evidence in the most favorable light.

B. Evidence From the Trial

The parties presented far too much evidence at trial to recite all of it here, though all of it must be, and was, considered by this Court. However, in an effort to discuss the evidence in the light and with all reasonable inferences most favorable to the party opposed to the motion, see Farpella-Crosby, 97 F.3d at 805, the Court will focus this explanation of its decision on the evidence favorable to Brown.

1. Foot Locker

The evidence revealed Foot Locker,fn2 an international shoe and athletic apparel chain, classified its stores based on the racial makeup of each store's customer base. The varying explanations of the classifications showed generally that stores with 60% or more black clientele were considered "ethnic"; stores with 95% or more black clientele were labeled "AA"; stores with 90% to 95% black clientele were "A"; stores with 75% or 80% to 89% black clientele were "B"; stores with 60% or 70% to 74% or 79% black clientele were "C"; and stores with less than 60% or 70% black clientele were considered "non-ethnic." Lloyd Brown, the plaintiff in this case, was a Foot Locker manager who worked at two AA stores and resigned after he was repeatedly denied the opportunity to manage "non-ethnic"

stores.

Foot Locker regularly sent "420 forms" to store managers in Texas. These "420 forms" contained various data about the stores, including the ethnic classification.fn3 Foot Locker argued the classifications were used for legitimate marketing reasons, but the evidence was certainly not conclusive that this was true. A reasonable jury could disbelieve that rationale for the racial classification system and instead believe the system was used to classify stores for the purpose of assigning managers.fn4 Foot Locker Regional Vice President Kevin Rucker, who is in charge of personnel for Foot Locker but has never worked in Texas, testified that Foot Locker used the merchandising codes inconsistently. Rucker encouraged Foot Locker to change the codes to its current purportedly geographic labels of "urban" and "suburban." However, other evidence indicated that under the new coding, "urban" refers to stores with largely black clientele and 'suburban" refers to stores with primarily non-black clientele. Foot Locker offered into evidence no memoranda, reports, letters, or notes explaining how the "merchandising" codes were to be used. Additionally, there was evidence that no ethnic classification codes were ever used in the northeastern United States. The fact that Foot Locker had no documentary evidence of its "merchandising coding" and that its officers gave widely varying explanations of the merchandising coding clearly hurt Foot Locker's credibility.

The evidence showed that generally black managers of Foot Locker stores were only allowed to manage AA or A-classified stores, and white managers were selected to manage every type of store. The plaintiff offered testimony of several witnesses who managed Foot Locker stores and noticed this pattern.fn5 Only two black managers were known to have managed non-ethnic Foot Locker stores. One of these managers, Benjamin Ellis, testified at trial, and he

was a very credible witness and apparently a competent manager. Ellis testified that he managed four ethnic stores before he managed a non-ethnic, or "regular," store. When Ellis was offered the "regular" store, he was told he was being offered that particular store because it was getting heavy "weekend black traffic."fn6 In trying to discredit Ellis, counsel for Foot Locker attempted to insinuate Ellis was fired from his job as manager of a regular store because he broke a Foot Locker regulation. On redirect examination, Ellis explained that he quit when he felt he was improperly investigated for an alleged "release date" violation.fn7

Foot Locker offered no evidence to controvert the plaintiffs testimony that black managers were generally not assigned to non-black stores in Texas while white managers were selected to manage all types of stores. Instead, Foot Locker offered evidence that black men held various vice president positions outside of and within Texas, and Foot Locker had a black vice president sit at the defense table. It could not have escaped the jury's notice that Foot Locker offered only witnesses from offices around the country with little or no knowledge of facts involved in this case, and none of these witnesses rebutted Brown's evidence that only one or two black managers were ever assigned to non-ethnic stores.

The jury also heard evidence from Foot Locker executives that all of Foot Locker's records had been destroyed (thrown away, shredded, or deleted from the computers) regarding the race classification system and the race of managers at the stores with the various classifications. Foot Locker offered evidence that the only information about the racial classification codes was found on the "420 forms," which managers generally threw away after they reviewed them.fn8

2. Lloyd Brown

The plaintiff Lloyd Brown is an African American man who worked for Foot Locker from February 1989 to December 1995. He started his management career with Foot Locker in October 1990 at its Killeen Mall store. It is undisputed that Brown did an excellent job at Killeen Mall, repeatedly setting sales records and receiving recognition for his success. Brown won several awards and raised the sales volume at his store dramatically. Soon after Brown began managing the Killeen Store, he met many store managers at meetings and during audits. Through these contacts, Brown perceived that black managers were not hired to manage non-ethnic stores, and managers of non-ethnic stores were more often promoted to District Manager positions.

Furthermore, he noted that white managers were generally promoted more rapidly than black managers. Due to Brown's ambitions, by 1992 he made it known to his supervisor, District Manager Jan Balder, that he was interested in managing non-ethnic stores.

Brown was "promoted" in 1993 to Town Center Mall, a "AA" store in Fort Worth, after he started making it known that he wanted to be considered for regular stores.fn9 Although Brown desired a promotion to a non-ethnic store, he believed Balder's claim that the opportunity was a promotion and accepted the position without visiting Town Center Mall. Brown was told his new store had a sales volume of $1.1 million per year. When Brown arrived at Town Center as its new manager in July 1993, he learned it was not much of a "promotion" at all. The mall store fronts were thirty- to forty-five-percent vacant. Gangs were prevalent in the mall and in the neighborhood. There was a curfew during all mall business hours preventing youths under 18 years old from shopping in the mall without an adult.fn10 Auto theft and shootings were normal occurrences near the mall. The Town Center Mall Foot Locker's sales volume had gone from $1.1 million down to $980,000 in

1993, with projected annual sales of $870,000.

Brown replaced Ellis, who was in turn being "promoted laterally" to a different store. Ellis managed the Town Center Mall store from 1991 to 1993. The year before Ellis took over the Town Center Mall store, it had predicted sales of $2 million. However, the problems with crime, the curfew, and vacancies soon began, and sales plummeted during Ellis's management of the store.

When Ellis was promoted from Town Center, he was told he would be replaced by an "ethnic" store manager. The defendants offered testimony suggesting this meant Ellis would be replaced by a store manager who could handle an "ethnic" store such as the Town Center Mall, but the jury was entitled to interpret what that statement meant.

Without a doubt, Brown had a difficult time managing the Town Center Mall store. Based on the evidence presented to the jury, anyone would have. After Brown took over, annual sales dropped to $577,000, but by 1995, Brown was able to increase sales by $32,000. Aside from the problems with the mall environment, Brown testified that he had trouble receiving proper credit for merchandise he received and/or returned. This contributed to a problem called "shrinkage," which is the term of art for the percentage of inventory that is not accounted for. Additionally, while some evidence suggests Brown was doing well objectively, the evidence also shows he was subjectively criticized harshly by Jan Balder and by auditors. Throughout these problems, Brown attempted to keep a positive attitude and stated in several evaluations and audits that he would work harder and do better. Foot Locker attacks Brown's comments of his intent to improve as admissions of Brown's incompetence and further asserts Brown should have complained in writing on his evaluations if he was being treated unfairly.fn11 A possible (and actually more plausible)

interpretation of the comments was that Brown had a good attitude and wanted to overcome the obstacles in his path. The jury was certainly entitled to this inference from the evidence.

In 1995, Brown learned two new Foot Locker-affiliated stores would be opening in Austin, Texas, and Brown was interested in managing one of those stores for two reasons: (1) he was still interested in managing a non-ethnic store, and (2) Brown's mother-in-law lived in Austin, and the Brown family wanted to move closer to her. Brown's family in fact moved to Austin on July 29, 1995.fn12 A new Foot Locker store would be opened in the newly constructed Lakeline Mall, and a new Foot Locker-affiliated store called ASP would open in Barton Creek Square Mall. Brown applied for and was rejected to manage these stores. Brown asserts he was rejected because of discrimination, but Foot Locker argues it had nondiscriminatory reasons for denying Brown's requested transfers to the non-ethnic stores in Austin.

Mike Zoiber,fn13 who was named manager at the Lakeline Mall Foot Locker instead of Brown, had only one year experience as a manager and was still managing his "rookie" store, a store smaller than Brown's. Zoiber had served four years as a Foot Locker associate,fn14 while Brown had over four years experience as a manager and six years as an associate. Like Brown, Zoiber had some good and some bad qualifications. The jury heard testimony that Brown's objective credentials were better than Zoiber's, and the jury was of course permitted to believe that testimony. Brown testified that in October 1995, he was told by his District Manager, Jan Balder, that the reason he was not given the Lakeline Mall job was that he was not "promotable." Foot Locker argued at trial that Zoiber was more qualified to manage the $900,000 volume Lakeline Mall Foot Locker, while Brown had proven himself

incompetent managing a store of lesser volume.

Martin Rhoads was a Hispanic Foot Locker employee with no management experience prior to his appointment as manager of the AXP store at Barton Creek Square Mall, the other Austin non-ethnic Foot Locker-affiliated store to which Brown requested a transfer. Foot Locker argued the AXP store given to Rhoads was "too small" for Brown because it was a starter store for rookie managers with a sales volume of $400,000 to $500,000 per year, and it would have been a demotion for Brown. However, Brown made Foot Locker aware at the time that he would have been willing to accept a pay cut in order to have the opportunity to manage the non-ethnic AXP store. Nevertheless, Brown also learned in October 1995 that he would not receive his requested transfer to the AXP store.

If Foot Locker's Goldilockesque "too big"/"too small" argument did not ring hollow to the jury, Foot Locker's constant criticism of every shortcoming in Brown's personnel record may have. Foot Locker spent a large amount of time pointing out every shortcoming in every evaluation and audit that it could reveal. However, this may have been a waste of time because: (1) whites who had similar or worse problems were promoted; (2) the plaintiff offered evidence of bias in audits based on race;fn15 and (3) Brown himself was offered a promotion despite his allegedly horrible record.

Additionally, Foot Locker's efforts to portray Brown as an incompetent manager may not have persuaded the jury. The major problem Foot Locker continuously harped on and repeatedly asserted was so important was "shrinkage." However, Brown offered evidence that he had trouble receiving proper credit for his inventory. He offered specific evidence of certain instances in which he was not credited the proper amount. Foot Locker attacked that evidence as insufficient to show Brown had an acceptable "shrinkage"

rate, but the concrete evidence was symptomatic of the problems Brown was going through. Furthermore, despite Foot Locker's arguments to the contrary, "shrinkage" is not the only measure of a manager. Brown was able to meet the Foot Locker goal of reducing his wage expenses by decreasing part-time help. As Brown explained, having less personnel on the sales floor decreases store security and can lead to more theft, which negatively affects the "shrinkage" rate. Even Foot Locker Regional Vice President Clyde Roenbeck testified that Brown tripled his sales goal in 1995, met three former deficiencies, and showed objective improvement despite Balder's subjective appraisal stating Brown was not doing well. The evidence further showed that Balder had questionable evaluation practices and was removed from her position as District Manager in part because of her failure to accurately evaluate managers.

In comparison to other Foot Locker managers, the jury could have reasonably found Brown's performance was not as ugly as Foot Locker attempted to paint it. For example, Zoiber, the manager who was placed in the Lakeline Mall Foot Locker instead of Brown, had several blemishes and "unacceptable" ratings on his evaluations. The jury heard credible testimony that Brown's objective evaluations were better than Zoiber's. Additionally, Ed Fillmore, a white, former Foot Locker manager, testified that he was actually promoted to a larger store one week after being audited and attributed $7,000 in shrinkage, a far greater shrinkage total than Brown ever had in any of his audits.

Aside from the evidence that Brown was the most qualified candidate to manage either the Lakeline Mall or Barton Creek Square Mall stores, a determination of discrimination could have been inferred from Balder's representations that Brown was "promotable" to a AA store but not to a non-ethnic store. In September 1995, Brown was offered a position as manager of the Fort Worth Outlet Mall,

a "AA" store with a sales volume of $1.4 million to $1.6 million. To be sure, the testimony on this point was contradictory. Brown, who came across as a credible witness, said he was offered the promotion by Balder, but he turned it down because he wanted an opportunity to manage a non-ethnic store. Joe Maldonado, a less credible witness than Brown, testified he was offered the manager position of the Fort Worth Outlet Mall and was told by Balder he was the second choice because Brown had declined Balder's offer to manage the store. Balder, who testified by video deposition and was not a particularly credible witness, asserted she never offered Brown a position as store manager of the Fort Worth Outlet Mall. However, the jury could have reasonably believed Brown's and Maldonado's version of the facts over Balder's contradictory version. Determining witness credibility is a job for the jury, not for the Court. If the jury believed Brown, it could conclude Foot Locker's argument was pretextual that Brown was not qualified to manage the $900,000 Lakeline Mall Foot Locker store. Instead, this evidence suggests Brown was "promotable" to a $1.5 million AA store but not to a $900,000 non-ethnic store because of his race.

By November 1995, Brown realized that his constant requests to be considered fairly for a non-ethnic store were fruitless. Therefore, Brown filed a race discrimination complaint with the Equal Employment Opportunity Commission ("EEOC") on November 6, 1995. Foot Locker entered its appearance in response to the EEOC complaint on January 8, 1996. No one from Foot Locker ever spoke with Brown about his EEOC complaint. A new District Manager was assigned to Brown after he filed his EEOC complaint, and Brown once again expressed his interest in being transferred to a non-ethnic store. The District Manager stated Brown would have to "prove himself' to the new District Manager, suggesting Brown's years of patience and effort managing AA stores would be set aside while less

experienced white managers continued to get promotions. Brown resigned from Foot Locker in December 1995.

After all this treatment, Foot Locker attempted to suggest to the jury it was unreasonable for Brown to quit. This was not only a nonsensical argument, but an offensive one. Foot Locker was foolish to argue to the Court, and much less to the jury, that a man unreasonably quit his job after he was denied the opportunity to manage non-ethnic stores based on his race after spending several years of his life working hard and attempting to prove he was as capable as white managers.

A large amount of statistical evidence was offered at trial, but the Court disregards that evidence for purposes of this order. The statistical evidence was not necessary to support the jury's verdict, and it is difficult to determine what the statistics actually meant. The plaintiff's expert did not perform a sufficiently sophisticated analysis of the statistics to offer any meaningful information, and the defendant's expert offered an overly academic explanation that helped the jury little and appeared to be more sleight of hand than anything. The numbers showed that black managers generally received less pay than white managers. It was never made clear whether this is because recent good-faith recruitment efforts have led to the hiring of more black managers or because it is difficult for black managers to get lucrative positions due to discrimination. At any rate, the non-statistical evidence was more than sufficient to lead a rational trier of fact to believe that Brown was qualified to manage the non-black stores he applied for, and Foot Locker's institutionalized "separate and unequal" classification system barred him from those stores.

C. Analysis of Defendant's Arguments

1. Evidence of Discrimination

The defendant argues the plaintiff has failed to provide sufficient evidence of intentional race discrimination by the defendant. In order to prove a claim for race discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, a plaintiff must prove by a preponderance of the evidence that he was denied employment opportunities and/or discharged because of his race. 42 U.S.C. § 2000e-2(a). The burden of proof is on the plaintiff.

Based on the evidence described above, the jury had sufficient evidence before it to arrive at the conclusion that the plaintiff was denied numerous "employment opportunities" because of his race. The evidence clearly established Foot Locker classified its stores by race. Evidence was presented to show black managers were generally denied opportunities to manage stores classified as "non-ethnic." The evidence also suggested white managers were promoted more quickly and black managers were evaluated and audited more harshly. The jury could have concluded from the evidence that Brown was the most qualified manager for one or both of the Austin stores and was denied a transfer because of his race. There was evidence that Foot Locker's offered race-neutral justifications for not promoting Brown were pretextual: (a) Foot Locker's argument Brown was not "promotable" to a $900,000 store was pretextual in light of evidence Brown was offered a $1.5 million store; (b) the objective evidence of evaluations and management experience showed Brown was clearly more qualified than Zoiber for the Lakeline Mall store that was deemed "too big" for Brown; and (c) Brown's willingness to accept a pay cut undercut Foot Locker's argument that the AXP store was "too small" for Brown. Finally, as discussed below, there was sufficient evidence to convince the jury this intentional discrimination by Foot Locker led to Brown's constructive discharge. In short, the plaintiff provided more than enough evidence of intentional discrimination to support

his Title VII claim.

2. Evidence of Constructive Discharge

The defendant argues the plaintiff was not constructively discharged. In order to prove constructive discharge, Brown must establish that working conditions at Foot Locker "were so intolerable that a reasonable employee in [his] position would feel compelled to resign." Webb v. Cardiothoracic Surgery Assocs. of N. Tex., P.A., 139 F.3d 532, 539(5th Cir. 1998) (citing Faruki v. Parsons S.LP., Inc., 123 F.3d 315, 319 (5th Cir.1997)). Additionally, "[p]art of an employee's obligation to be reasonable is an obligation not to assume the worst, and not to jump to conclusions too fast." Id. (citations omitted).

> Whether a reasonable employee would feel compelled to resign depends on the facts of each case, but we consider the following factors relevant, singly or in combination: (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement on terms that would make the employee worse off whether the offer was accepted or not.

Barrow v. New Orleans S.S. Ass'n, 10 F.3d 292, 297(5th Cir. 1994).

As discussed above, there was sufficient evidence for a reasonable jury to conclude that Foot Locker had a system of classifying its stores with racial coding and then denying

Black managers the opportunity to manage non-ethnic stores. The evidence did not suggest Brown quit after the first hint of discrimination or "jump to conclusions too fast." Webb, 139 F.3d at 539. Based on the evidence before the jury, a reasonable employee who was continuously denied the promotion and/or transfer opportunities he merited because of his race—after several years of patience and trying to prove he was as capable as managers of other races—could definitely feel compelled to resign.

Based on this evidence, the Barrow factors for constructive discharge were present. The evidence suggested that after Brown made it known he wanted an opportunity to manage a non-ethnic store, he was "promoted" to a highly undesirable store in what was in reality a demotion. Additionally, the denial of a promotion or transfer to a non-ethnic store based on his race had the same effect as demoting Brown, and the denial of opportunities and harsher scrutiny based on his race effectively reduced Brown's salary.fn16 Furthermore, the evidence of harsher subjective evaluations and audits of black managers not only prevented promotions and pay raises, but it also suggests behavior that is at least as pernicious as "badgering" or "harassment." Being treated more harshly in audits and evaluations is yet another reason for a black manager to feel compelled to resign. Finally, the message Foot Locker was sending to Brown, that he was not able to manage a non-ethnic store because of his race, was humiliating. Hence, based on the evidence before the jury and Fifth Circuit law, it was reasonable to conclude that a reasonable employee in Brown' s position would have felt compelled to resign based on the systematic racial discrimination by Foot Locker. Indeed, a reasonable jury may have been amazed by Brown's patience and endurance in staying with Foot Locker as long as he did.

3. Evidence of Mental and Emotional Damages

Foot Locker argues Brown has offered insufficient evidence of his mental and emotional damages. Brown did not offer medical, psychological, or psychiatric expert testimony on his mental and emotional damages. However, in the Fifth Circuit there is no rule that "medical evidence or corroborating testimony is always required for an award of mental anguish damages." Migis v. Pearle Vision, Inc., 135 F.3d 1041, 1046 (5th Cir. 1998).

The plaintiff stated that Foot Locker's discrimination against him caused him stress, loss of sleep, inability to enjoy his family, marital strains, and humiliation. These problems lasted for two years while Brown worked at the Town Center Mall and continued after Brown was constructively discharged by Foot Locker. When Brown described his humiliation at being treated as less of a man because of his race, he became choked up and cried on the witness stand. It was up to the jury to determine to what extent this strong, athletic man's tears represented mental and emotional anguish. Additionally, Brown's wife corroborated his testimony and stated Brown lost confidence and was upset, disenchanted, and remote toward herself and their children because of Foot Locker's discrimination against him.

In summary, the plaintiff offered sufficient evidence of mental and emotional anguish to merit a jury finding of $21,000 in damages based on their analysis of the evidence.

4. Evidence Supporting Punitive Damages

Foot Locker argues Brown is not entitled to punitive damages because he offered no evidence of malicious or outrageous discrimination by Foot Locker. "To recover punitive damages under Title VII, the plaintiff must show that the defendant acted with 'malice or with reckless indifference [to the federally protected rights of an aggrieved individual]." Farpella-Crosby, 97 F.3d at 809-10 (quoting 42

U.S.C. § 198la(b)(1)).

Foot Locker argues there is no evidence Balder or Roenbeck, Foot Locker employees, did anything willfully, recklessly, or with malice toward the plaintiff. However, the defendant in this case is Foot Locker, not Balder, Roenbeck, or any other individual. Foot Locker argues that the type of behavior that would justify punitive damages would be using racial epithets or derogatory comments about a given race, threatening employees of a given race with undeserved disciplinary conduct, and intentionally falsifying documents. fn17 Foot Locker's Motion for Judgment [#85], at 3 (citing Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927,927 (5th Cir. 1996), cert. denied, 1175. Ct. 767 (1997)).

Although there is no evidence of the use of racial epithets or supervisors expressing overt bigotry against blacks in this case, there was evidence of undeserved poor evaluations, undeserved negative consideration for management positions at non-ethnic stores, and hiding or intentional destruction of documents. Most importantly, there is evidence that Foot Locker acted with "malice or reckless indifference" to the Title VII rights of black employees such as Brown. The plaintiff presented more than enough evidence to persuade a rational fact finder that Foot Locker deliberately implemented a policy and practice throughout the state of Texas of classifying its stores by race and limiting black managers to opportunities within "ethnic" stores while systematically denying black managers the opportunity to manage "non-ethnic" stores. If this is not acting "willfully, recklessly, or with malice" toward the right to be free from race discrimination, the undersigned is not sure what is.

Additionally, the evidence implied that Foot Locker knew of its wrongdoing and attempted to cover it up. The detailed "AA, A, B, C" racial classification system in force when Brown worked for Foot Locker was changed to the

inconsistently explained "urban/suburban" classification system shortly after Brown filed his EEOC complaint. Incredibly, Foot Locker through its agents asserted it had no documentation of its "AA, A, B, C" classification system—no documentation of why or how it was used, how the classifications were determined, or which stores had each classification. This perception of a cover-up, which the Court has warned Foot Locker about since early in this litigation, could have offered more evidence of malice to a rational jury.

Foot Locker's argument that there is no evidence Brown's supervisors ever used racial epithets or talked negatively about Brown's race misses the mark. Under Fifth Circuit law, comments about race alone may not even indicate that Brown was discriminated against by Foot Locker, because they may be mere "stray remarks." Smith v. Berry Co., 165 F.3d 390, 396 (5th Cir. 1999) (holding that a supervisor's prior remark stating that he doubted whether a woman could perform a given job was merely a "stray remark" that could not support an inference of discrimination). The evidence in this case is much more compelling than one involving name-calling and suggests an even more reprehensible form of discrimination. Instead of mere evidence of racial animus by low-level supervisors, it suggests a deliberate and detailed corporate policy of classifying stores by race and then denying opportunities to black managers while keeping all opportunities open to white managers. There was plenty of evidence for a rational jury to come to this conclusion, and Foot Locker did little to rebut it during the trial. Instead, the evidence suggests Foot Locker attempted a cover-up, indicating it knew the racial classification system was wrong and intended to hide information relating to its existence.

5. Amount of Punitive Damages

The defendant argues $250,000 is an excessive

amount of punitive damages in light of Fifth Circuit law. There is a statutory limit of $300,000 total for punitive damages, future pecuniary damages, and nonpecuniary damages in Title VII cases. See 42 U.S.C. § 1981a(b)(3)(D).fn18 The applicable damages awarded by the jury in this case were $250,000 in punitive damages, $29,600 for lost future earning capacity, and $21,500 for mental anguish. The total of these damages is $301,100, which is $1,100 over the statutory cap. Therefore, the jury award must be reduced by $1,100 according to statute, and the Court will subtract that amount from punitive damages to bring that award down a bit to $248,900.

The plaintiff requested $2.5 million in punitive damages in this case, and the jury awarded ten percent of that amount, or $250,000, which the Court reduces to $248,900 pursuant to statute in this order. Foot Locker cites a case that has been vacated for rehearing en banc subsequent to the filing of Foot Locker's brief for the proposition that "$100,000 is on the high end for cases of this type in our circuit." Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 598 (5th Cir. 1998), rehearing en banc granted & opinion vacated, 1999 WL 107104 (Feb. 26, 1999). Nevertheless, this citation no longer offers strong authority. Furthermore, the Deffenbaugh-Williams quotation, to the extent it may represent good law, is somewhat taken out of context by Foot Locker. The comparison of a punitive damages award to punitive damages awards in similar cases is only one of three factors to be considered in analyzing the reasonableness of an award of punitive damages. A second consideration is the ratio of punitive damages to compensatory damages, and a third and "perhaps the most important factor is the reprehensibility of the defendant's conduct. Id; see also BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589 (1996) (setting forth these three factors). As discussed above, Foot Locker's behavior in deliberately establishing a racial classification system for its stores and

then denying black managers opportunities to manage non-ethnic stores based on their race registers high as the "perhaps most important" reprehensibility factor and merits a large amount of punitive damages. The ratio of punitive damages to compensatory damages is 2.7:1, and ratios higher than 4:1 have been ruled permissible. See BMW, 116 S. Ct. at 1602. Finally, the Court is not aware of comparable conduct to that put on this record: an international chain classifying stores by racial code and then denying employees of a given race the opportunity to work at certain stores because of theft race. Considering all these factors, $248,900 is not an excessive amount of punitive damages.

II. Plaintiff's Motion for Attorney Fees and Costs

The plaintiff seeks an award of $115,747.50 in attorney fees and $32,591.94 in taxable and non-taxable expenses. The plaintiff is clearly a "prevailing party" entitled to reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988. Foot Locker objects to the attorney fees and costs to the extent it argues Brown is not a "prevailing party." In light of this order denying Foot Locker's Motion for Judgment nearly in full, this argument fails. Foot Locker asserts it "reserves its right" to object to specific elements of Brown's claim for attorney fees. However, Brown has already filed his motion for an award of attorney fees and costs, detailing every hour of attorney time, staff time, and costs. The defendant misconstrues Local Rule CV-7(j) as "contemplating" that motions for entry of attorney fees shall be filed after entry of judgment. However, the Local Rule does not "contemplate" anything and instead clearly states that "[a]ll motions for an award of attorney's fees shall be filed and served no later than fourteen (14) days after entry of judgment." [T]he plaintiff filed his motion before that deadline and the defendant has had a full opportunity to object within ten calendar days of the date of filing of the plaintiffs motion, as provided in Local Rule 7(j)(2). Rather

than stating what the rules "contemplate," Foot Locker should follow them. The Court does not recognize the defendant's self-proclaimed "reservation of right" to file untimely objections. Nevertheless, the Court will carefully evaluate the plaintiffs request for attorney fees and costs.

An award for attorney's fees is calculated by use of the "lodestar method." Riley v. City of Jackson, Miss., 99 F.3d 757, 760 (5th Cir. 1996). With this method, the district court must first determine from the attorney's time records the appropriate amount of compensable hours, excluding hours unreasonably spent. Shipes v. Trinity Indus., 987 F.2d 311, 319 (5th Cir.), cert. denied, 114 S. Ct. 548 (1993). The court then multiplies this number by an hourly rate, which is determined by the prevailing community standards for attorneys of similar experience working on similar cases, to produce the "lodestar" amount. Id. The court may then adjust the lodestar upward or downward given its consideration of the various factors outlined in Johnson v. Georgia Highway Express, 488 F.2d 714,717-19 (5th Cir. 1974). Riley, 99 F.3d at 760. Adjustment may not be made, of course, for Johnson factors already subsumed in the determination of the lodestar, which almost always include (1) the novelty and complexity of the issues; (2) the special skill and experience of counsel; (3) the quality of representation; (4) the results obtained from the litigation; (5) preclusion of other employment; and (5) time and labor required. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 106 S. Ct. 3088 (1986); Shipes, 987 F.2d at 320-22. Indeed "most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee" are subsumed in the lodestar figure. Pennsylvania, 106 S. Ct. at 3098.

This should have been a standard Title VII race discrimination case. The case would not have been unusually complex but for the inexcusable discovery and litigation

tactics of Foot Locker. These tactics, some of which have been outlined above, caused (1) an increase in the complexity of the plaintiff's case, (2) an increase in the amount of time needed for plaintiff's counsel to litigate his case, and (3) foreclosure of an increased amount of other work plaintiff's counsel could have done. Although Foot Locker has already been sanctioned for its abusive discovery behavior, the plaintiffs counsel is correct in pointing out that subtracting that amount from the plaintiffs a ward would only nullify the penalizing and deterrent effect of those sanctions. Because the defendant engaged in serious discovery abuses which must be penalized and deterred, the Court will not subtract the amount of the sanctions.

Additionally, it is clear that the defendant has not been cooperative in this lawsuit. Plaintiffs counsel and his staff have had to do everything on theft own. It is unclear whether the defendant was incompetent or was intentionally stonewalling throughout this litigation, but it is clear the defendant increased the costs of the plaintiffs assertion of his rights in this lawsuit.

Amazingly, Foot Locker's highest offer of settlement prior to trial was $6,000. This is an atrocious offer in a lawsuit in which Foot Locker classified its stores by racial code, lost or destroyed all records of these racial classifications or what legitimate purpose they served, faced empirical evidence that black managers were generally not allowed to manage "non-ethnic" stores, and refused employment in non-ethnic stores to a credible and likable manager who was not "promotable" to the non-ethnic stores but allegedly was "promotable" to ethnic stores.fn19 This lowball offer is a sign of bad faith, stupidity, or both. The defendant's conduct cost plaintiff's counsel plenty during this litigation, and the defendant will now bear that cost because the plaintiff was the prevailing party. fn20

The bill statement submitted by plaintiffs counsel,

Mr. Brenner, reflects that he and his staff spent 827.70 hours on this lawsuit. The court finds this number reasonable in light of the trench warfare the plaintiff was required to engage in from the beginning of this lawsuit. Mr. Brenner requests a fee of $175 per hour for himself and his partners; $125 per hour for his associates and $50 per hour for his legal assistants. The Court concludes that given the experience, reputation, and ability of Mr. Brenner and his partners and associates, these are not an unreasonable fees. This Court has found that fees up to $190 per hour to be reasonable in Title VII casesfn20 for attorneys of similar skill to Mr. Brenner and his partners, and Mr. Brenner requests even less than that amount.

Multiplying the hourly rate by the hours compensable, the Court reaches a lodestar of $115,747.50. No other factors listed in Johnson appear to warrant an adjustment upward or downward of this figure. The results obtained, while hopefully sending a long-needed message to Foot Locker, directly affect only Mr. Brown and not a broad range of employees at Foot Locker. The plaintiff brings forth no special time limitations or other circumstances warranting in increase of the lodestar.

After an examination of the costs requested by the plaintiff, including reasonable expert costs of $10,500,22 the Court finds those costs were reasonable and necessary in light of this litigation. Therefore, the Court will grant the plaintiff its costs of $32,591.94 in addition to its attorney fees of $115,747.50, for a total of $148,339.44.

In accordance with the foregoing, the Court enters the following orders:

IT IS ORDERED that the Plaintiffs Motion for Leave to File a Response to Defendants' Motion for Judgment Exceeding Ten Pages [#87] is GRANTED;

IT IS FURTHER ORDERED that Foot Locker's Motion for Judgment [#85] is DENIED;

IT IS FURTHER ORDERED that the Plaintiffs Motion for Judgment [#81] is GRANTED;

IT IS FURTHER ORDERED that the Plaintiffs Motion for Assessment of Attorney Fees and Costs [#82] is GRANTED; and

IT IS FINALLY ORDERED that the plaintiff Lloyd Brown shall have and recover against the defendant Foot Locker $90,933.00 in compensatory damages as awarded by the jury, $248,900.00 in punitive damages as reduced by the Court from the $250,000 in punitive damages awarded by the jury, and $148,339.44 in attorney fees and costs as determined by the Court.

SIGNED this the 25th day of March 1999.

"SAM SPARKS"
UNITED STATES DISTRICT JUDGE

Footnotes

fn1The Court will grant the Plaintiffs Motion for Leave to File a Response to Defendants' Motion for Judgment Exceeding Ten Pages [#87].

fn2 For the sake of simplicity, "Foot Locker" refers to Kinney Shoe Corporation d/b/a Foot Locker; ASF/Foot

Locker; Champs Sports; Lady Foot Locker; Susie's; Lady Footlocker; and Athletic X-Press.

fn3There was evidence that the "420 forms" did not classify as "ethnic" stores with a large Hispanic or other minority clientele.

fn4 The only offered "merchandising reason" for Foot Locker's classification was that blacks have larger feet and Hispanics smaller feet than whites. This testimony may have alienated a reasonable jury because there was conflicting evidence of whether there were any Hispanic-coded stores, which would be pertinent to merchandising under the "foot-size" theory.

Moreover, William Randall, Foot Locker's "merchandising expert" was an expert in merchandising makeup, crafts, and health foods. He had no experience with shoe or clothing retailers. Foot Locker counsel only made this shortcoming more painfully obvious by grasping for straws and pointing to the fact that Foot Locker sells one cologne—presumably the Michael Jordan cologne. Foot Locker's expert offered potentially relevant evidence on the importance and reasonableness of merchandising toward the ethnicity of the customer; but Foot Locker never showed how its merchandising codes were determined or how they were utilized in serving customers of different races or ethnicities.

fn5 The jury heard evidence from several Foot Locker employees stating their personal knowledge of the race of managers of various types of stores. Corporate records reflecting the races of the managers and the racial coding of the stores would have been a preferable source of information, but Foot Locker made it clear throughout discovery and throughout the trial that it had no trace of such information.

Foot Locker's only offered "evidence" of its coding system came in the form of a list of stores with a handwritten

listing of the classifications of the stores. Foot Locker could provide no evidence whatsoever as to who created the list, and it could not offer a single corporate representative to verify the accuracy of the list. Therefore, the Court ruled the evidence was inadmissible because it could not be authenticated as required by Fed. R. Civ. Evid. 901.

fn6 It is noteworthy that Ellis's account of the "heavy black weekend traffic" reason for his assignment to the "regular" store was uncontested by any testimony offered by Foot Locker.

fn7 A "release date" is a given date for release of a new Foot Locker product. Foot Locker managers are not permitted to sell the new product before its "release date." Ellis told an account of a woman who was a repeat Foot Locker customer who promised her son a pair of new Air Jordan basketball shoes if he improved his grades. The woman came to Ellis the Wednesday prior to a Friday release date for the new Air Jordans. Ellis told the woman he could not sell the shoes prior to the release date. After an extended discussion in which the woman explained she could not arrive to wait in line at 7:00 a.m. Friday because she had to work, Ellis agreed to accept the woman's money ahead of time, placed a note and receipt in the safe explaining the transaction, and arranged for a pair of new Air Jordans to be set aside for the woman to pick up on or after the release date. Ellis believed this procedure did not violate the release date rule and instead complied with Foot Locker's corporate mantra of pleasing repeat customers. When the receipt was discovered in a later audit, Ellis was taken to task for violating release date policy. Fed up with Foot Locker's treatment of him after ten years of stellar employment performance, Ellis quit Foot Locker and immediately got another job in the retail business.

The testimony showed that Foot Locker had no policy of terminating every manager who committed a release date violation; therefore, this was another example of a black Foot

Locker manager being treated harshly and in a discriminatory manner.

fn8 Foot Locker has engaged in obfuscation regarding its ethnic coding of its stores since the outset of this litigation. On April 13, 1998, the plaintiff filed its First Motion to Compel and For Sanctions [#5]. The plaintiff complained that the defendant failed to respond to initial interrogatories and generally gave plaintiffs counsel the runaround. Foot Locker failed to respond to the plaintiffs motion, and the Court therefore granted the plaintiffs motion as unopposed on May 4, 1998. The Court taxed $1,000 in sanctions against Foot Locker, overruled Foot Locker's objections to the interrogatories, and gave Foot Locker seven days to fully answer and respond to the plaintiffs discovery requests.

On August 24, 1998, the plaintiff filed Plaintiffs Second Motion for Sanctions [#15], and on September 3, 1998, the plaintiff filed his Motion to Strike Fact Witnesses [#27]. Foot Locker responded to these motions, and the Court held a hearing on the motions on September 11, 1998. The Second Motion for Sanctions arose because Foot Locker alleged it did not have information designating which stores were AA, A, B, C, and regular stores because it has switched to a classification system of "urban," "suburban," and "super" stores. The plaintiff argued this was disingenuous because the AA, A, B, C system had been implemented until 1996 or 1997, and the plaintiff filed his EEO complaint at the beginning of 1996. The plaintiff suggested spoliation of evidence had occurred and should be punished. Foot Locker argued it did not destroy evidence and that it offered the plaintiff "urban," "suburban," "super," data that gave the plaintiff the information he needed because stores classified as "urban" under the new system would have been classified "AA" or "A" under the "old" system. Foot Locker never explained, because it could not, how the plaintiff could derive complete information on the AA, A, B, C, and regular stores based on the current classification of urban, suburban, and

super stores—even the basic information of which individual stores were classified as AA, A, B, or C.

The Court found it incredible that Foot Locker and/or its counsel were unable to provide store records from merely two or three years ago and that defense counsel misunderstood the plaintiffs theory and the information he sought through discovery. The urban/suburban breakdown clearly did not show the breakdown for the heart of the matter—whether black managers were discriminated against in opportunities to manage "regular" stores. It is possible that any black managers in the "suburban" stores only managed previous ethnic B and C stores and no "regular" stores, and that fact could not possibly be determined from the data given to the plaintiff by Foot Locker. Therefore, the Court ordered Foot Locker to come up with verified information reflecting the designation of the various stores under the AA, A, B, C categorization.

Regarding the Motion to Strike Fact Witnesses, the plaintiff complained that throughout discovery Foot Locker only identified five individuals who had knowledge of the relevant facts in the case, but Foot Locker listed seventeen additional persons on its witness list filed on September 1, 1998, after discovery had closed. Although the Court could have stricken all witnesses because of the failure to timely designate them, the Court instead allowed Foot Locker to designate its four most important witnesses, subject to depositions by the plaintiff at the cost of Foot Locker. Due to Foot Locker post-discovery revelation of new fact witnesses, which revealed counsel's apparent fundamental misunderstanding of federal procedure, the Court had to move the trial date from October 1998 to February 1999.

Lo and behold, after the Court made it clear it was not going to tolerate Foot Locker's stonewalling, on September 15, 1998, Foot Locker "found" alleged records indicating the classification of its stores under the "old" AA, A, B, C system. By September 22, 1998, Foot Locker filed an apologetic brief, blaming everything on an underling named

Mark Becker who had the files in his office all along. The "diligent" Foot Locker executives and lawyers were shocked and appalled at this incompetence and revealed everything to the Court as soon as they could (one week after the "revelation"). Foot Locker gave this information to the plaintiff, asserting it complied with the Court's order to provide verified information on the AA, A, B, C classification system.

Thereafter, the Court assessed sanctions of $11,433.88 in attorney fees and expenses against Foot Locker for its continual discovery abuses. By the time of trial, it became clear no Foot Locker representative would authenticate the "discovered" records of the Foot Locker store classifications. No one would state who completed the documents or whether the documents were accurate. Therefore, the plaintiff was back to square one, without any evidence from Foot Locker records of how its stores were classified by race, which would enable the plaintiff to confirm or deny his theory of discrimination based on the strong evidence he already had.

The plaintiff filed a request for a spoliation instruction at trial. It was a close question for the Court, but it denied the plaintiff's motion. Nevertheless, the jury was permitted to make its own inferences based on the evidence presented at trial about any potential cover-up and/or document hiding by Foot Locker.

fn9 When Brown was "promoted" out of the AA-classified Killeen Mall store, he was replaced there by a black manager.

fn10 This curfew had a severe impact on Foot Locker business because the 13-18-year-old demographic group is a primary target of Foot Locker's marketing.

fn11 Leave it to litigation attorneys to suggest that a good way to get a promotion is to criticize one's evaluators and avoid taking responsibility and that an employee expressing

his intent to improve his performance is demonstrating incompetence.

fn12 The jury heard this evidence and Foot Locker's argument that Brown wrongly felt he was entitled to a store in Austin. The jury also had the discretion to give that argument as much or as little weight as it deserved.

fn13 The parties referred repeatedly to Mike "Zoiber," as do several documents, but several other Foot Locker records spell his name "Ziober."

fn14 Foot Locker refers to its employees who work in its stores as "associates."

fn15 Benjamin Ellis testified that he assisted in several audits in Texas at the time of Brown's employment at Town Center Mall, and Ellis noticed audit elements were scrutinized more strictly in stores with black managers. Moreover, Ellis stated, "You can always find something wrong in an audit." Foot Locker auditor Robert Parrott testified he had never seen a black manager treated differently on an audit, but this is yet another credibility determination for the jury.

fn16 Evidence was presented to the jury that suggested Brown could have been promoted to a higher sales volume store or been on a faster track to a lucrative District Manager position or even possibly a Regional Vice President position if his advancement opportunities were not limited by Foot Locker's apparent caste system of assigning black managers primarily to ethnic stores.

fn17 It is noteworthy that Foot Locker does not include intentionally destroying documents as an example of behavior justifying an award of punitive damages.

fn18 "The sum of the amount of compensatory damages

awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—. . . in the case of a respondent who his more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000." Id.

fn19 Additionally, the paltry $6,000 was barely half of the amount Foot Locker was sanctioned for discovery abuses.

fn20 The Court warned both parties early in the litigation to take their settlement offers seriously and to be proud of those offers. While Foot Locker certainly is not proud of that offer in light of the result of the lawsuit, the Court will not assess extra penalties toward. Foot Locker for unreasonable settlement negotiations since the compensatory damages, punitive damages, attorney fees, and costs should be sufficient to teach Foot Locker a lesson. (But many things about Foot Locker's behavior have surprised this Court.)

fn21 See, e.g., Bragg v. Texas Dep't of Criminal Justice, Cause No. A-96-C A-217-SS (W.D. Tex. (1997).)

fn22 See 42 U.S.C. § 1988(c).

No. 99-50493

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LLOYD BROWN,
Plaintiff - Appellee-Cross-Appellant,

versus

KINNEY SHOE CORP., doing business as Foot Locker, doing business as ASF/Foot Locker, doing business as Champs Sports, doing business as Lady Foot Locker, doing business as Susie's, doing business as Athletic X-Press,
Defendant - Appellant-Cross-Appellee.

January 15, 2001, Decided

February 21, 2001, Filed

JUDGES:
Before JOLLY, SMITH, and BARKSDALE, Circuit Judges.

OPINION BY:
E. Grady Jolly

OPINION:

ON PETITION FOR REHEARING AND REHEARING EN BANC

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court

having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

"E. Grady Jolly"

United States Circuit Judge

No. 99-50493

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LLOYD BROWN,
Plaintiff - Appellee-Cross-Appellant,

versus

KINNEY SHOE CORP., doing business as Foot Locker, doing business as ASF/Foot Locker, doing business as Champs Sports, doing business as Lady Foot Locker, doing business as Susie's, doing business as Athletic X-Press,
Defendant - Appellant-Cross-Appellee.

Filed 1/15/01

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed in part and reversed in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

No. A 97 CA 859 SS

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN

LLOYD BROWN,
Plaintiff,

versus

KINNEY SHOE CORP., doing business as Foot Locker, doing business as ASF/Foot Locker, doing business as Champs Sports, doing business as Lady Foot Locker, doing business as Susie's, doing business as Athletic X-Press,
Defendant.

Filed 3/26/99

FINAL JUDGMENT

BE IT REMEMBERED that on this the 25th day of March 1999 the Court entered an order in the above-styled cause granting to a great extent Plaintiff's Motion for Entry of Judgment and denying Defendant's Motion for Judgment as a Matter of Law. Pursuant to that order, the Court enters the following final judgment:

IT IS ORDERED, ADJUDGED, AND DECREED that the plaintiff Lloyd Brown do have and recover judgment against Kinney Shoe Corporation d/b/a Foot Locker, ASP/Foot Locker, Champs Sports; Lady Foot Locker, Susie's; Lady Footlocker; and Athletics X-Press in the amount of $339,833.00 plus attorney fees and costs in the amount of $148,339.44 and all costs taxed by the Court, and that judgment shall bear interest of 4.918% per annum, for

which let execution issue; and

IT IS FINALLY ORDERED, ADJUDGED, AND DECREED that all further relief not specifically granted is DENIED.

SIGNED on this the 25th day of March 1999.

"SAM SPARKS"
UNITED STATES DISTRICT JUDGE
UNITED STATES COURT OF APPEALS

No. A 97 CA 859 SS

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN

LLOYD BROWN,
Plaintiff,

versus

KINNEY SHOE CORP., doing business as Foot Locker, doing business as ASF/Foot Locker, doing business as Champs Sports, doing business as Lady Foot Locker, doing business as Susie's, doing business as Athletic X-Press,
Defendant.

Filed 2/10/99

JURY INSTRUCTIONS

MEMBERS OF THE JURY:

You have heard the evidence in this case. I will now instruct you on the law that you must apply. It is your duty to follow the law as I give it to you. On the other hand, you at the judges of the facts. Do not consider any statement that I have made during the trial or make in these instructions as an indication that I have any opinion about the facts of this case.

After I instruct you on the law, the attorneys will have an opportunity to make their closing arguments. Statements and arguments of the attorneys are not evidence and are not instructions on the law. They are intended only to assist the jury in understanding the evidence and the parties' contentions.

The burden is on the plaintiff in a civil action such as this to prove every essential element of his claim by a "preponderance of the evidence." A preponderance of the evidence simply means the amount of evidence that persuades you that the plaintiffs claim is more likely true than not true.

In determining whether any fact has been proved by a preponderance of the evidence, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who called them, and all exhibits received in evidence, regardless of who produced them. If the proof fails to establish any essential part of the plaintiff's claim by a preponderance of the evidence, then you must find for the defendant as to that claim.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given the witness's testimony. An important part of your job will be making judgments about the testimony of the witnesses who testified in this case. You should decide whether you believe what each person had to say, and how important that testimony was. In making that decision I suggest you ask yourself a few questions: Did the person impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with any party to the case? Did the witness have a good memory? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness said.

In making up your mind and reaching a verdict, do not make any decisions simply because there were more witnesses on

one side than the other. Do not reach a conclusion on a particular point just because there were more witnesses testifying for one side on that point. You must think about the testimony of each witness and decide how much you believe of what each witness said. The testimony of a single witness may be sufficient to prove any fact, even if a greater number of witnesses testified to the contrary—if after considering all the other evidence you believe that single witness.

The testimony of a witness may be discredited by showing that the witness testified falsely concerning a material matter, or by evidence that at some other time the witness said or did something, or failed to say or do something, which is inconsistent with testimony the witness gave at this trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people may forget certain details or recollect events inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was an intentional falsehood or simply an innocent lapse of memory. The significance of that may depend on whether it has to do with an important ant fact or with only an unimportant detail.

While you should consider only the evidence in this case, you may draw reasonable inferences from the testimony and the exhibits that you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to thaw from the facts that have been established by the testimony and evidence in the case. There are two types of evidence that you may consider. One is direct evidence, such as testimony of an eyewitness. The other is indirect or circumstantial evidence, which is the proof of a chain of circumstances that indicates the existence

or nonexistence of certain other facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial.

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

A corporation, such as Foot Locker, of course may act only through natural reasons such as its agents or employees. Any authorized action by an official, employee, or agent of a corporation constitutes an action by that corporation. Therefore, Foot Locker is responsible for any unlawful acts of its officials, employees, or agents made while they were acting within the scope of the authority given them by Foot Locker or within the scope of their duties as an official, employee, or agent of Foot Locker. Evidence that an act was done as part of the job assigned to an official or employee of Foot Locker is sufficient for you to conclude that the act was authorized by Foot Locker.

Under federal law, it is unlawful for an employer to intentionally discriminate against any person with respect to compensation, tenure, conditions, or privileges of employment because of such person's race. In this case, the plaintiff, Lloyd Brown, alleges that the defendant, Foot Locker, discriminated against him in his employment because of his race. He claims that Foot Locker's refusal to promote or transfer him to management positions in Foot Locker stores with predominantly white clientele was undertaken because of his race, African-American. The defendant, Foot Locker, claims that the reasons Mr. Brown was not offered

the promotions or transfers he requested were based upon business decisions having nothing to do with his race.

Attached to this Jury Charge is a Verdict Form that contains three questions. Before answering a particular question on the Verdict Form, you must consider the instructions for that question provided below. Bear in mind, members of the jury, that you may or may not ultimately answer every question. Carefully follow the "roadmap" instructions contained below and on the Verdict Form to determine which questions you must answer.

Instructions for Question One

Question One asks: "Do you find from a preponderance of the evidence that Defendant Foot Locker discriminated against Mr. Brown based on his race?"

It is unlawful for an employer to discharge or otherwise discriminate against an employee because of the employee's race. In order for Mr. Brown to prevail on his claim against Foot Locker, he must prove by a preponderance of the evidence that his race was a "motivating factor" in any of Foot Locker's adverse employment decisions. An "adverse employment decision" is any decision by an employer such as Foot Locker that negatively affects an employee such as Mr. Brown with respect to compensation, tenure, conditions, or privileges of employment. Taking adverse employment action toward an employee who is black is not illegal if the reasons for doing so are unrelated to the employee's race. Therefore, the fact that Mr. Brown is black and Foot Locker took adverse employment actions toward him is not sufficient, in and of itself, to establish his claim under the law. Similarly, the fact that Foot Locker may have mistreated the plaintiff or it made an unwise decision regarding the plaintiff's employment is not sufficient to establish plaintiff's claim under the law. Finally, simply because you do not

agree with the employment decisions made by Foot Locker or the manner in which the decisions were made is not sufficient to establish plaintiffs claims under the law. You must find that an adverse employment decision was made by Foot Locker because of Mr. Brown's race in order to answer "yes" to Question One.

If you find that Foot Locker made an adverse employment decision toward Mr. Brown solely because of factors other than his race, you must decide in favor of Foot Locker. Only if you decide that Mr. Brown's race was a factor that motivated or played a part in Foot Locker's adverse employment decision can you decide in favor of Mr. Brown. Mr. Brown need not prove his race was the sole motivation or the primary motivation in an adverse employment decision. Mr. Brown need only prove that his race played a part in Foot Locker's adverse employment decision—even though other factors may have also motivated Foot Locker.

Although Mr. Brown must show that Foot Locker intentionally discriminated against him, he is not required to produce direct evidence of discrimination. Intentional discrimination may be inferred from the existence of other facts. You may consider any statement made or act done or omitted by any individual whose intent is in issue, and all other facts and circumstances which indicate his or her state of mind.

If, after considering all these factors, you find from a preponderance of the evidence that race was a motivating factor in Foot Locker's adverse employment decision toward Mr. Brown, you must answer Question One on the Verdict Form "yes" and proceed to answer Question Two. If you do not so find, answer Question One "no" and answer no further questions.

Instructions for Question Two

Question Two asks: "What sum of money, if now paid in cash, would fairly and reasonably compensate Mr. Brown for the damages he has sustained as a result of Foot Locker's discrimination against him based on his race?"

If Mr. Brown has proved, by a preponderance of The evidence, his discrimination claim against Foot Locker—that is, you have answered Question One "yes"—you must determine the damages to which Mr. Brown is entitled. You should not interpret the fact that I am giving the following instructions about the plaintiffs damages as an indication in any way that I believe that he should, or should not, win. It is your task first to decide whether Foot Locker is liable. I am instructing you on damages only so that you will have guidance in the event you decide that Foot Locker is liable and that Mr. Brown is entitled to recover money from Foot Locker.

If you find that Foot Locker is liable to Mr. Brown on his employment discrimination claim, you must determine, from a preponderance of the evidence, an amount that is fair and reasonable compensation for Mr. Brown's damages. These damages are called compensatory damages. The purpose of compensatory damages is to make the plaintiff whole—that is, to compensate the plaintiff for the damage, if any, that he has suffered.

You may award compensatory damages only for injuries that Mr. Brown proved resulted from Foot Locker's wrongful conduct. The damages that you award must be fair compensation for all of Mr. Brown's damages, no more and no less. Compensatory damages are not allowed as punishment and cannot be imposed or increased to penalize the defendant. You should not award compensatory damages for speculative injuries, but only for those injuries Mr. Brown has actually suffered or, in the case of damages for future loss

of earning capacity, those damages he is also reasonably likely to suffer in the future.

If you decide to award compensatory damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let the difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that Mr. Brown prove the amount of his losses with mathematical precision but only with as much definiteness and accuracy as circumstances permit. You must use sound discretion in fixing an award of damages, drawing reasonable inferences where you find them appropriate from the fact and circumstances in evidence.

Mr. Brown's claim for damages includes distinct types of damages, as set forth in subparts "a" through "c" of Question Two on the Verdict Form. You must consider each separately and enter separate amounts for each type of damage on the Verdict Form. You must not include the same types of damage in more than one subpart.

If you answered Question One "yes," Mr. Brown may be entitled to the lost wages established by a preponderance of the evidence that he would have earned if Foot Locker had not discriminated against him. This amount consists of the wages Mr. Brown would have received from Foot Locker if it had not discriminated against him, less the total amount established by a preponderance of the evidence that Mr. Brown has earned or could have earned during the same period in wages and benefits from employment.

In this case, the plaintiff alleges he was "constructively discharged." To find that Mr. Brown was constructively discharged, you must find that Foot Locker made Mr. Brown's working conditions so intolerable that a reasonable employee would feel compelled not to continue

working for Foot Locker. If you find from a preponderance of the evidence that Mr. Brown was constructively discharged as a result of discrimination by Foot Locker, you must award him compensation for the lost wages, if any, proved by a preponderance of the evidence lie has suffered in the past (in subpart "a") and the loss in wage-earning capacity, if any, that the plaintiff is likely to suffer in the future due to the discriminatory conduct of Foot Locker (in subpart "b").

A person who claims damages resulting from the wrongful act of another h is a duty under the law to use reasonable diligence to mitigate—that is, to avoid or minimize—those damages. If you find that Foot Locker is liable and Mr. Brown has suffered damages, Mr. Brown may not recover for any item of damage which he could have avoided through a reasonable effort. If you find by a preponderance of the evidence Mr. Brown unreasonably failed to take advantage of an opportunity to lessen his damages, you should deny him recovery for those damages which he would have avoided had he taken advantage of the opportunity.

You are the sole judge of whether Mr. Brown acted reasonably in avoiding or minimizing his damages. An injured plaintiff may not sit idly by when presented with an opportunity to reduce his damages. However, he is not required to exercise unreasonable expenses in mitigating the damages. Foot Locker has the burden of proving the damages which Mr. Brown could have mitigated. In deciding whether to reduce Mr. Brown's damages because of his failure to mitigate, you must weigh all the evidence in light of the particular circumstances of the case, using sound discretion in deciding whether Foot Locker has satisfied its burden of proving that Mr. Brown's conduct was not reasonable.

Any award of future lost earning capacity necessarily

requires that payment be made now for a loss that a plaintiff will not actually suffer until some future date. Therefore, if you should find that Mr. Brown is entitled to future lost earning capacity, then you must determine the present value in dollars of such future damages. An award of an amount representing future losses is more valuable to the plaintiff if he receives it today than if he received it in the future. It is more valuable because the plaintiff can earn interest on it for the period of time between the date of the award and the date he would, in the normal course of time, have gotten the money. Thus, you should adjust the amount of any award for future losses by the amount of interest that the plaintiff can earn on that amount in the future.

Under the law, Mr. Brown is also entitled to damages for past emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life resulting from unlawful discrimination, if any. Subpart "c" of Question Two involves this type of injuries. If you determine that Mr. Brown has proven by a preponderance of the evidence that he has experienced such damages as a consequence of Foot Locker's discriminatory action, you may award him damages for those injuries.

No evidence of the value of intangible things, such as mental pain and suffering, has been or need be introduced. You are not trying to determine value, but an amount that will fairly compensate the plaintiff for the damages he has suffered. There is no exact standard for fixing the compensation to be awarded for these elements of damage. Any award that you make should be fair in light of the evidence.

When considering the amount of monetary damages to which Mr. Brown may be entitled for these injuries, if any, you should consider the nature, character, and seriousness of any emotional pain, suffering, mental anguish, and loss of

enjoyment of life Mr. Brown experienced. You must also consider its extent or duration, as any award you make must cover damages endured by Mr. Brown since the wrongdoing, to the present time.

If you have answered Question Two by awarding money damages, answer Question Three. If you do not find Foot Locker liable for money damages under Question Two, proceed no further.

Instructions for Question Three

If you have found that Foot Locker intentionally discriminated against Mr. Brown based on his race and you have awarded him compensatory damages on that claim, the law allows, but does not require, you to award punitive damages. These are awarded in exceptional cases as a punishment of the defendant and as a warning to others to keep them from following the defendant's example.

You may award punitive damages if Mr. Brown has proved that Foot Locker acted with malice or willfulness or with callous and reckless indifference to the safety or rights of others. One acts willfully or with reckless indifference to the rights of others when he acts in disregard of a high and excessive degree of danger about which he knows or which would be apparent to a reasonable person in his condition.

Mr. Brown has introduced what he considers evidence of Foot Locker's malicious or callous and reckless disregard for his rights because of his race. You may find that one, all, or none of these examples indicate Foot Locker's evil-minded intent toward Mr. Brown. Again, it is for you to determine the credibility, relevance, and significance of each piece of evidence and whether it supports Mr. Brown's contention that punitive damages should be awarded.

If you determine that Foot Locker's conduct was so shocking and offensive as to justify an award of punitive damages, you may exercise your discretion to award those damages. In making any award of punitive damages, you should consider that the purpose of punitive damages is to punish a defendant for its conduct, and to deter the defendant and others from engaging in similar conduct in the future. The law does not require you to award punitive damages. However, if you decide to award punitive damages, you must use sound reason for setting the amount of the damages. The amount of an award of punitive damages must not reflect bias, prejudice, or sympathy toward any party. However, the amount can be as large as you believe necessary to fulfill be purposes of punitive damages. You may consider the financial resources of the defendant in fixing the amount of punitive damages.

Punitive damages must bear a reasonable relationship to the plaintiff's actual injury. However, no single numerical equation has been made to easily link punitive to compensatory damages. In determining a reasonable relationship to the actual injury, you must consider all relevant factors. These include the impact or severity of the defendant's conduct, the nature of the wrong, the situation and sensibilities of the parties concerned, the amount of compensatory damages, the attitudes and actions of the defendant's top management after the misconduct was discovered, the extent to which such conduct offends a public sense of justice and propriety, the effect of the damages award on the defendant's financial condition, and any punishment the defendant may receive from other sources.

Deliberations and Verdict

Any verdict must represent the considered judgment of each juror. In order to answer a question or return a verdict, it is necessary that each juror agree to the verdict. In

other words, the answers to your questions and your verdict must be unanimous.

Answer each question from the facts as you find them. Do not decide who you think should win and then answer the questions accordingly. Do not let bias, prejudice or sympathy play any part in your deliberations. A corporation, a state agency, and a person are equal before the law and must be treated as equals in a court of justice.

It is your duty as jurors to consult with one another and to deliberate in an effort to reach agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, you may choose to re-examine your own views and even change your mind completely after discussing the evidence with the other jurors. However, do not surrender your honest conviction as to the weight or the effect of the evidence solely because of the opinion of your fellow jurors or for the sole purpose of reaching a verdict.

Remember at all times that you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Upon retiring to the jury room you should first select one of your number to act as your presiding juror who will preside over your deliberations and will be your spokesperson here in Court. A Verdict Form has been prepared for your convenience.

You will take the Verdict Form to the jury room, and when you have reached unanimous agreement as to your verdict, you will have your presiding juror fill it in, date and sign it, and then return to the courtroom.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing signed by the presiding juror and pass the note to the court security officer who will bring it to my attention. I will either answer your question in writing or bring you back to the courtroom for other verbal instructions. If you send a written message or question to the Court, however, do not volunteer any information on the progress of the jury in reaching a verdict.

Submitted the 10th day of February 1999 at 3 o'clock p. m..

UNITED STATES DISTRICT JUDGE

No. A 97 CA 859 SS

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN

LLOYD BROWN,
Plaintiff,

versus

KINNEY SHOE CORP., doing business as Foot Locker, doing business as ASF/Foot Locker, doing business as Champs Sports, doing business as Lady Foot Locker, doing business as Susie's, doing business as Athletic X-Press,
Defendant.

Filed 3/26/99

VERDICT FORM

We, the jury, unanimously answer the following questions by a preponderance of the evidence:

QUESTION ONE

Do you find from a preponderance of the evidence that Defendant Foot Locker discriminated against Mr. Brown based on his race?

Answer "yes" or "no."

ANSWER: yes

If you have answered "yes" to Question One, proceed to "Instructions for Question Two" in the Jury Instructions. If you have answered "no" to Question One, answer no further questions.

QUESTION TWO

What sum of money, if now paid in cash, would fairly and reasonably compensate Mr. Brown for the damages he has sustained as a result of Foot Locker's discrimination against him based on his race?

Answer separately in dollars and cents, if any.

a. Loss of wages and benefits from the date of the defendant's discriminatory conduct until the present.
$39,833.00

b. Loss of value of earning capacity from this date into the future caused by the defendant's discriminatory conduct.
$29,660.00

c. Emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life suffered by the plaintiff from the date of the onset of the discrimination until the present date.
$21,500.00

If you have answered Question Two by awarding money damages, proceed to "Instructions for Question Three" in the Jury Instructions. If you do not find Foot Locker liable for money damages under Question Two, proceed no further.

QUESTION THREE

What sum of money, if any, should be awarded to Mr. Brown as punitive damages against Foot Locker?

Answer in dollars and cents, if any.

$250,000,00

Signed the 11th day of February 1999 at 12:55 o'clock p.m.

"Presiding Juror"